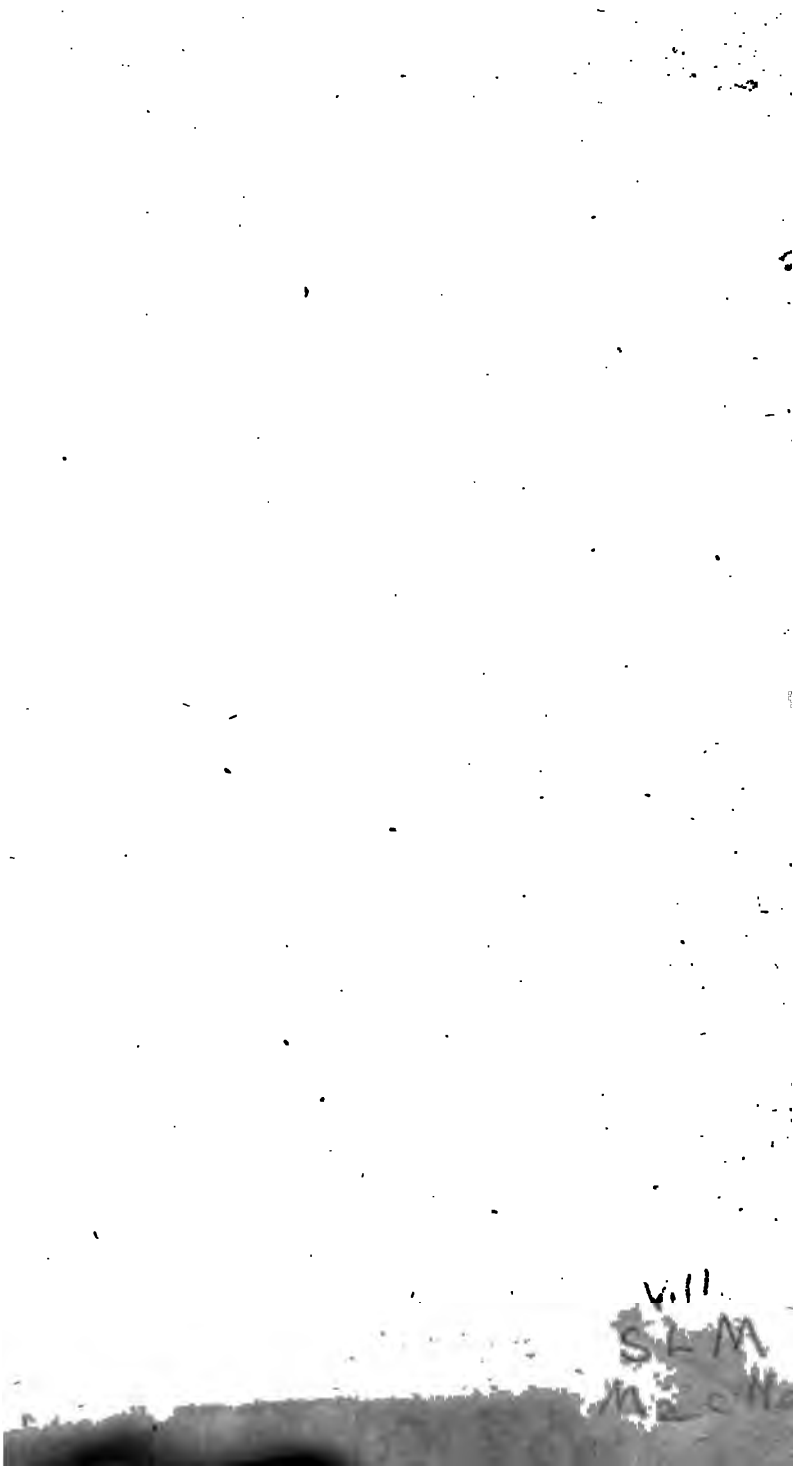

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THE

RULES OF EVIDENCE

ON

Pleas of the Crown,

ILLUSTRATED FROM

PRINTED AND MANUSCRIPT

TRIALS AND CASES.

BY *LEONARD MAC NALLY*, ESQ.
BARRISTER AT LAW.

RULES OF EVIDENCE ARE OF VAST IMPORTANCE TO ALL ORDERS AND DEGREES OF MEN; OUR LIVES, OUR LIBERTY, AND OUR PROPERTY ARE CONCERNED IN THE SUPPORT OF THEM.

LORD KENYON.

VOL. II.

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1802.

THE

RULES OF EVIDENCE

ON

Pleas of the Crown.

BOOK III.

OF WRITTEN EVIDENCE.

LORD Chief Baron GILBERT makes a queſtion, which of the two, *written* or *unwritten* evidence is to be preferred in the ſcale of probability, when they ſtand in oppoſition to each other.

CICERO, ſays the learned judge, in his declaiming for *Archias*, gives a handſome turn in favour of unwritten evidence: pleading for the freedom of the poet, when the tables of the enfranchiſement were loſt; he ſays,—"But here you demand the production of the "archieves of *Heraclea*, which it is known to us all pe-"riſhed in the Italian war. Ridiculous! to have no "reply to the evidence in our poſſeſſion; and to demand "that which it is impoſſible we ſhould have! to diſre-"gard the recent information of men, and to inſiſt on "the authority of regiſters! and when you have the "illuſtrious ſanction of a man of the firſt eminence and "honour, the uncorruptible teſtimony of a free city, "to require proof from tables, which yourſelves ac-"knowledge to be often corrupted!"

But, ſays GILBERT, the balance of probability is certainly on the other ſide; for the teſtimony of an honeſt man, however fortified by the ſolemnity of an oath, is yet liable to the imperfections of memory; and as the remembrance of things fail and go off, men are apt to entertain opinions in their ſtead; and therefore the argument turns the other way in moſt caſes, for contracts reduced to writing, are the moſt certain and deliberate acts of the mind, and are more advantageouſly ſecured from all corruption, by the forms and the ſolemnities of the law, than they poſſibly could have been if retained in memory only. *Gilb. Evid. by Loft*, 7.

NOTE.—The firſt chapter of the ſecond book is equally introductory to this. The principle there laid down pervades and directs the reception or rejection of every matter offered in evidence, and the application of every rule; that is, that in order to obtain for the jury legal demonſtration, the beſt evidence that the nature of the charge is capable of muſt be given. Vide *book* 2. *ca.* 1. 342, *to p.*

CHAPTER I.

Of Similarity of Hand-writing.

Rule the Firſt.

THOUGH mere compariſon of hand-writing is admiſſible evidence under particular circumſtances, reſulting from the neceſſity of the caſe in civil actions, yet it is not admiſſible evidence on criminal proſecutions.

GILBERT, C. B. ſupports the antiquity and juſtice of this rule. He ſays, that the compariſon of hands only, ſhould be proof in a criminal proſecution, was never law, but in the time of *James* the ſecond, and the diſtinction has ever been taken, that the compariſon of hands is evidence in civil, but not in criminal caſes. *Gilb. Evid. by Loft*, 54.

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The reaſons why the compariſon of hands is evidence in civil matters, is, becauſe men are diſtinguiſhed by their hand-writing as well as by their faces; for it is very ſeldom that the ſhape of their letters agrees any more than the ſhape of their bodies; therefore the compariſon of hands ſerves for a diſtinction in civil commerce; for the likeneſs does induce a preſumption that they are the ſame; and, the preſumption is evidence, till the contrary appears: for every preſumption that remains uncontеſted, hath the force of an evidence; for light proof on the one ſide will outweigh the defect of the proof on the other: but in criminal proſecutions the preſumption is in favour of the defendant, for thus far is to be hoped of all mankind, that they are not guilty in ſuch inſtances, and the penalty enhances the preſumption. Now, the compariſon of hands is no more than a preſumption, founded only on the likeneſs, which may eaſily fail; becauſe they are very ſubject to be counterfeited. Therefore, when the compariſon of the hands is the *only* evidence in a criminal proſecution, there is no more than one preſumption againſt another, which weighs nothing. *Gilb. Evid. by Loft*, 54. Vide *rule* 3, *in this chapter*.

In the KING, *v.* ſir HENRY VANE, *Trinity*, 14 *Car.* 2. *B. R. anno* 1662. The warrant for the execution of *Charles* 1. was produced, and evidence of the hand writing of ſir *Henry Vane* was received, though the witneſſes, *Thomas Lewis*, and *Thomas Turner*, only ſwore to their belief, neither of them affirming that they ſaw him write it. 2 *St. Tr.* 442.

In the KING, *v.* ALGERNON SIDNEY, tried for high treaſon, *B. R. Mich.* 35 *Car.* 2. *anno* 1683, before ſir GEORGE JEFFERIES, C. J. the court received as evidence, ſimilitude of hand-writing.

The *attorney-general* (ſir *Robert Sawyer*) examined ſir *Philip Lloyd*, as to where he found certain papers then produced; and the witneſs ſaid, I had a warrant from the ſecretary, by the king and council, to ſeize Mr. *Algernon Sidney*'s papers, and purſuant to it, I did go to his houſe, and ſuch as I found there I put up. I found a great many upon the table, amongſt which were theſe;

I ſuppoſe it is where he uſually writes; I put them in a pillow bier I borrowed in the houſe, and that in a trunk. I deſired colonel *Sidney* would put his ſeal upon them that there ſhould be no miſtake; he refuſed, ſo I took my ſeal and ſealed up the trunk, and it was carried before me to Mr. ſecretary *Jenkin*'s office. When the committee ſat, I was commanded to undo the trunk, and I did ſo, and found my own ſeal upon it; and I took the papers out of the bag I put them into before.

Q. Was colonel *Sidney* preſent when you ſeized theſe papers? A. Yes. Q. Are theſe ſome of thoſe papers? A. Yes—I verily *believe* it.

Attorney-general. In the next place I think we have ſome papers of his particular affairs, which will prove his hand. Call Mr. *Shepherd*, Mr. *Cook*, and Mr. *Cary*.

Attorney-general, (to *Shepherd* who was ſworn). Look upon thoſe writings *(ſhewing the libel)*—are you acquainted with colonel *Sidney*'s hand? A. Yes. Q. Is that his hand-writing? A. Yes, ſir, I believe ſo. I believe all theſe ſheets to be his hand. Q. How came you to be acquainted with his hand? A. I have ſeen him write the indorſement upon ſeveral bills of exchange.

Colonel *Sidney*. My lord, I deſire you would be pleaſed to conſider this, that ſimilitude of hands can be no evidence.

Mr. *Cary* being ſworn. I never ſaw him write, to my knowledge, more than once in my life; but I have ſeen his indorſement upon bills, and it is very like that.

Lord Chief Juſtice. Do you believe it his hand, as far as you can gueſs?

Mr. *Cary*. My lord, it is like what came to me for his hand-writing.

Lord Chief Juſtice. And you believe it to be his hand-writing? A. Yes.

Lord Chief Juſtice (to Mr. *Cooke* who was ſworn) what ſay you, Mr. *Cooke?* A. My lord, I did never ſee colonel *Sidney* write; but I have ſeen ſeveral notes that have come to me with indorſement of his name, and we have paid them, and it is like to this.

Lord Chief Juſtice. And you were never called to account for miſpayment? A. No, my lord.

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The libel was read.

Colonel *Sidney*, (in his defence ſaid,) I am not to give an account of theſe papers. I do not think they are before you, for there is nothing but the ſimilitude of hands offered for proof. There is the like caſe of my lady *Carr* ſome years ago: ſhe was indicted of perjury, and as evidence againſt her, ſome letters of her's were produced, that were contrary to what ſhe ſwore in chancery, and her hand was proved, that is to ſay, it was like it: but my lord chief juſtice *Keiling* directs the jury, that though in civil caſes it is a proof, yet it is the ſmalleſt and leaſt of proofs; but in criminal caſes it is none at all. As to theſe papers, I do not think I am to give any account of them. The ſimilitude of hands is nothing: we know that hands will be counterfeited ſo that no man ſhall know his own hand. 3 *St. Tr.* 802, 806. 2 *Hawk. P. C. ca.* 46.

On the trial of the *ſeven* BISHOPS, *B. R. Trinity*, 4 *Jac.* 2. *anno* 1688, preſent ſir ROBERT WRIGHT, C. J. HOLLOWAY, POWELL, and ALLYBONE, juſtices: for a libel. The queſtion whether ſimilitude of hands, be evidence in a criminal caſe, was fully debated, and the judges were divided in opinion.

Levinz, Pemberton, and Pollexfen, of counſel for the biſhops, objected to the admiſſibility of ſuch evidence. They inſiſted that proof by compariſon of hands can not be received in a criminal caſe. In ſuch caſe, the witneſs ſwearing to his belief, from compariſon of writing, could never be convicted of perjury. To prove handwriting, only by thoſe that ſaw letters but never ſaw the defendant write, did not even amount to ſo much as compariſon of hands. In every petty cauſe depending on the compariſon of hands, the rule was to bring ſome of the party's hand writing, which might be proved the party's own hand, and then it is to be compared in court with what is endeavoured to be proved; and, upon comparing them together in court, the jury may determine. And, therefore, as to this evidence; firſt, we ſay compariſon of hands ought not to be given at all in caſes of criminals; and it was never heard that it ſhould. In the next place, if it be admitted to be evidence, yet it is not ſuch

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an evidence as that by compariſon of hands the jury may take notice of it; for in ſuch manner of proof by compariſon of hands, the uſage is that the witneſs is firſt aſked, concerning the writing he produces, "Did you "ſee this writ by the defendant?" (whoſe hand they would prove) if he anſwers "yes, I did," then ſhould the jury, upon compariſon of what the witneſs ſwears to, with the paper that is to be proved, judge whether thoſe hands be ſo like as to induce them to believe that the ſame perſon writ both; and not that the witneſs ſhould ſay, I had a letter from ſuch a perſon, and that is like the hand of that letter, therefore I believe it to be his hand. It is of great moment whether in a caſe of a miſdemeanor, either in an indictment or information, compariſon of hands be evidence proper to be offered. The King's Bench adjudged the contrary, upon an indictment for forgery, againſt lady *Carr*, as appears in *Syderfin*'s Reports. They offered to prove letters written by her to *Cox*. The court rejected it; and gave their judgment that it was no evidence, and that for this reaſon, becauſe of the evil conſequence of it: "for," ſay they, "it is an eaſy matter for any man's hand to be counter-"feited, and daily experience ſhews how eaſily that "may be done." Is it not eaſy then to cut down any man in the world by compariſon of hand? And proving that likeneſs by comparing it with ſomething that he hath formerly ſeen. This ſtrikes mighty deep; the honeſteſt man in the world and the moſt innocent may be deſtroyed, and yet no fault to be found in the jury or in the judges: if the law were ſo, it were an unreaſonable law. As to the caſe of SIDNEY, that was a caſe of treaſon. Now in the caſe of treaſon there is always other evidence brought, and this evidence comes in but as a collateral evidence, to ſtrengthen the other; but in this caſe it is the ſingle evidence, and proved only by what another believes. Now ſhall any be condemned by another's *belief* without proof? That was never evidence yet to convict any one. So that their proof fails in both points: for, firſt it ought to be conſidered whether compariſon of hands be evidence in a caſe of miſdemeanor? And next, if it be evidence, whether you will take it,

that

that the *belief* of a man that brings nothing to compare with it, or never ſaw the party write, but has received letters, and ſays this is like it, and therefore he believes it to be his hand, be good evidence as a compariſon of hands.

The Attorney General, Sir Thomas Powis, denied the introduction of ſuch evidence to be new, for that nothing was more uſual than for a witneſs to ſay he knows the hand of the party, for he has often ſeen his hand-writing or received letters from him, and that he believes the paper ſhewn to be his hand-writing. This is evidence given every day. *Sidney*'s caſe was appoſite. It is inſiſted that was evidence, becauſe found in his ſtudy; but that was not the reaſon, for a book of another man's writing may be found in my ſtudy; and, he inſiſted upon it, in his own defence: but the anſwer was that it ſhould be left as the queſtion—whether the jury would believe it upon the evidence that was given of its being his own hand writing? And ſo in this caſe, though it be not ſo ſtrong evidence as if we had brought thoſe who ſaw the defendants write the libel, yet evidence it is; and, whether it be ſufficient to ſatisfy the jury, may be a queſtion; but no queſtion, it is good evidence in law.

The Solicitor General, Sir William Williams, ſame ſide, put the caſe of *Algernon Sidney* as in point. He was indicted for high treaſon, and the treaſon inſiſted on was a writing ſuppoſed to be his, it having been found in his ſtudy. The queſtion was, whether it was his hand-writing, or no? There was no poſitive evidence that it was his hand-writing; there was no evidence produced to prove it to be his hand-writing, for there was no one that ſwore that they ſaw him write it; there was nothing proved but the ſimilitude of hands. Aye, but ſays Mr. Serjeant *Pemberton*, it was found in his ſtudy. Will Mr. Serjeant *Pemberton* be content that all the libels that are found in *his* ſtudy ſhall for that reaſon be adjudged to be libels, to be his hand-writing, and he to be a libeller for them? He will declare againſt that. What was evidence in one man's caſe will be evidence in another's. God forbid there ſhould be a diſtinction in law; and therefore this is good evidence.

Pemberton,

Pemberton, Serjeant. The court in *Sidney*'s caſe went upon this, that it was found in his ſtudy, and compared with letters and bills of exchange produced in court, which were ſworn to be of his hand-writing. *Ante* 396.

Solicitor General. The proof was no more than by compariſon of hands, they had no other proof, and that was objected to as being fallible. Paper with paper, it is true, would make the proof ſomething ſtronger, if in ſuch a caſe as this ſuch evidence could be produced. Which is the better evidence, men produced who are converſant with theſe lords, and acquainted with their hand-writing, and who though not willing to give evidence, ſwear it all to be the hand-writing of the archbiſhop of *Canterbury*, as they believe, which is as far as any man can ſwear who did not ſee the thing written. Now what was the objection in *Sidney*'s caſe but what is here? That any man's hand might be counterfeited. In that caſe Mr. *Wharton* undertook to counterfeit that hand, preſently, and that he who was to ſwear the compariſon ſhould not know which was the one and which was the other: that was ſtronger than this yet, *Sidney* loſt his life on that compariſon, ſo there is a precedent. They ſay the proving ſimilitude of hands is no evidence, unleſs you prove the actual writing. What a condition then will England be in when witneſſes are dead. Is it not the common practice to produce witneſſes to prove ſuch men are dead whoſe names are ſet as witneſſes to deeds, and that they believe the ſignature to be the hand-writing of theſe witneſſes? Can there be any greater evidence of ſuch a caſe, unleſs it be the confeſſion of the party himſelf.

Powell, *Juſtice*, ſaid, the counſel for the crown had not ſufficiently proved the paper to have been ſubſcribed by the biſhops to entitle it to be read. It is too ſlender a proof in ſuch a caſe. In civil actions ſlender proof is ſufficient to make out a man's hand, by letter to a tradeſman, or a correſpondent, or the like; but in criminal caſes, ſuch as this, if ſuch a proof be allowed, where is the ſafety of any man's life. I think there is no danger at all to the government in requiring good proof againſt offenders.

Wright,

WRIGHT, C J. thought there was proof enough to have the paper read; and ſaid he was not afraid nor aſhamed to ſay it, for he knew he ſpoke with the law. Let what would be ſaid of criminal caſes, and the danger of people's lives, there was more danger to the government if ſuch proof were not allowed to be good. Here is my lord archbiſhop and the biſhop of St. *Aſaph*, and my lord of *Ely*, their hands are proved. It is proved to be my lord archbiſhop's writing by Mr. *Brookes*, and he proves my lord *Ely*'s hand by compariſon, and ſo my lord of St. *Aſaph*'s. Then they come and ſay, we will prove the hands of the others by compariſon, and for that they bring witneſſes that ſay, they have received letters from them, and ſeen their hand-writing ſeveral times; and comparing what they have ſeen with this very paper, ſays the witneſs, "I do believe it to be his "hand."—Can there be greater evidence, or fuller?

ALLYBONE, *Juſtice*. Compariſon of hands is the objection; but then what is the inconvenience inſiſted upon? If a man be accuſed by compariſon of hands, where is he? He is in a lamentable caſe, for his hand may be ſo counterfeited that he himſelf may not be able to diſtinguiſh it. But conſider the other ſide. That may be an objection in matter of fact that will have very little weight if compared and ſet altogether: for, on the other ſide, where ſhall the government be if I will make libels and traduce government with prudence and diſcretion, and all the ſecrecy imaginable? I'll write my libel by myſelf—prove it if you can—that's a fatal blot to the government, and therefore the caſe is not the ſame, nor is the doctrine to paſs current here, becauſe every caſe depends upon its own fact. If I take upon me to ſwear I know your hand, the inducements are to myſelf how I came to know it ſo as to ſwear it. Knowledge depends on circumſtances. I ſwear that I know you, yet I may be under a miſtake; for I can have my knowledge of you no other way but from the viſibility of you, and another man may be ſo like you that there is a poſſibility of my being miſtaken—but that is good evidence. Now here are ſeveral that ſwear to my lord archbiſhop's hand-writing; as to ſome of the others, the

evidence is not ſo ſtrong, but there is enough to induce the reading of this writing.

HOLLOWAY, *Juſtice.* As this caſe is, there ought to be more ſtrong proof, for the proof ought to be ſtronger and more certain in criminal matters than in civil matters. In civil matters we do go upon ſlight proof, ſuch as the compariſon of hands, for proving a deed or a witneſſes name, and a very ſmall proof will induce us to read it; but in criminal matters we ought to be more ſtrict, and require poſitive and ſubſtantial proof, as is fitting for us to have in ſuch a caſe, and without better proof it ought not to be read.

The COURT being *divided*, evidence of *ſimilarity of hand-writing* was *rejected.*

NOTE—Immediately after the revolution, the attainder of ALGERNON SIDNEY was reverſed by parliament; the act reciting that "whereas *Algernon Sidney*, eſq. in the term of St. Michael, in the thirty-fifth year of the reign of our late ſovereign lord *Charles* the Second, in the court of *King's Bench, at Weſtminſter*, by means of an illegal return of jurors, and by denial of his lawful challenges to divers of them for want of freehold and without ſufficient *legal* evidence of any treaſon committed by him, there *being at that time produced a paper found in the cloſet of the ſaid* ALGERNON, *ſuppoſed to be his hand-writing, which was not proved by the teſtimony of any one witneſs to be written by him, but the jury was directed to believe it by comparing it with other writings of the ſaid* ALGERNON, and beſides that paper ſo produced, there was but *one* witneſs to prove any matter againſt the ſaid *Algernon*, and by a partial and unjuſt conſtruction of the ſtatute, declaring what was his treaſon, was unjuſtly and wrongfully convicted and attainted, and afterwards executed for high treaſon."—This act was paſſed on the petition of PHILIP *earl of* LEICESTER and HENRY *viſcount* SIDNEY, brother to the earl.

Therefore in the KING *v.* CROSBY, alias PHILIPS, *B. R. 7 Will.* 3. before HOLT, Chief Juſtice, &c. for *high treaſon.* The principal point of treaſon charged upon the defendant being the writing of ſeveral treaſonable papers, which the king's counſel endeavoured to prove,

prove, by compariſon of hands, having no other evidence; the defendant produced a copy of the act of parliament for reverſal of the attainder of *Algernon Sidney*, eſq. in which it was declared that the compariſon of hands is not legal evidence. And the jury acquitted him. *Skinner*, 578, 579. 1 *Lord Raym.* 39, 40. *S. C.* 12 *Mod. S. C.* Vide *Henſey's Caſe, &c. Poſt* 408. 10 *St. Tr. Append.* 42. *St.* 1 *Will. & Mar.* 8 *St. Tr.* 472.

In Sir JOHN FENWICK's caſe, before the *Commons of England*, on a bill of attainder, 8 *Will.* 3. the ſame point was made and given up by the counſel for the bill. 6 *St. Tr.* 79, 80.

Rule the Second.

But though mere compariſon of hand-writing be not evidence on an indictment or information, yet papers found in the cuſtody of the defendant, and the writing thereof being proved to be in his hand, by perſons who have *ſeen* him write, is ſufficient *preliminary* evidence to intitle the counſel for the crown to have them read.

As in the caſe of lord PRESTON, and others, at the *Old-Bailey*, *January Seſſions*, 2 *Will. & Mary*, *anno* 1690, before HOLT, C. J. Papers found in the defendant's *cuſtody* being produced, ſeveral witneſſes were called to prove the hand-writing to be his; ſome had never ſeen him write, but had ſeen his writing, yet their evidence that they *believed* the writing ſhewn them to be his hand, was not objected to. And Mr. *Wa*[illegible], who ſwore he *had* ſeen him write, but not very often, though he had ſeen him write his name and ſome letters, weakened his own teſtimony by obſerving, when he was deſired to look upon the papers, and to ſay whoſe hand he believed the writing to be, anſwered that one paper ſeemed to be *like* lord *Preſton*'s hand, but of the other he could not ſay ſo much, becauſe what he commonly ſaw him write was a large fair hand, and that ſhewn him was ſmall. 4 *St. Tr.* 447.

From the above it appears that thoſe who *believed* the writing to be lord *Preſton*'s, had never ſeen him write; and the witneſs who had *ſeen* him write did not ſwear he

believed the writing to be his. Yet this evidence, the very year after reverſing of the attainder of *Algernon Sidney*, was received in a capital caſe by lord HOLT.

In the KING *v.* FRANCIA, *Old-Bailey January Seſſions*, 3 *Geo.* 1. *anno* 1716; and, in LAYER's caſe, *B. R.* 9 *Geo.* 1. *anno* 1722. PRATT, C. J. ſays, "Can any "thing in the world be an authority more expreſs than "that of my lord *Preſton*, where all the papers which "were in his *cuſtody*, and taken out of his cuſtody, were "read without any *offer* or *proof* that they were his hand." 6 *St. Tr.* 279.

This caſe very ſtrongly ſupports the laſt rule. Mr. *Staunton*, a witneſs for the crown, was aſked, whether a paper produced was ſhewn to the priſoner, or any queſtion aſked him about it, when he was before the lords of the counſel; and after ſeveral other queſtions, put for the purpoſe of ſhewing an acknowledgment of the writing by the priſoner, the witneſs anſwered, that the priſoner did not expreſsly own the paper to be his hand-writing; nor was he aſked the queſtion. Neither did he deny it to be his hand-writing; but it was taken for granted to be ſo by the lords, and the priſoner made no offer to deny it.

Mr. *D'Oyley*, another witneſs, depoſed, that ſome papers produced were, he believed, the priſoner's hand-writing; for that he was acquainted with his hand, he being his clerk about fourteen years hence, and that he had received letters about five years paſt which he believed were written by him; then the papers were produced to be read, which was oppoſed by the counſel for the priſoner, becauſe ſimilitude of hands was no evidence.

Hungerford and Kettleby, counſel for the priſoner, ſubmitted that the papers offered could not be read. That the evidence had not brought them home to the priſoner, as there was no legal proof that they were in his hand-writing; and, conſequently, that he could not be affected by any thing that was in them. Likeneſs of hands was no evidence, and the examination before the counſel (which he ſtated) did not give an inference that he had owned the papers to be his hand-writing. The only evidence,

evidence, therefore, which can intitle thoſe papers to be read, is the likeneſs of evidence of hands, which is no evidence at all. In lady *Carr*'s caſe it was refuſed, yet that was not a capital caſe, but a miſdemeanor only. It was perjury. They ſtated the act for reverſing *Sidney*'s attainder, and the evidence on the trial, and conſidered that act and lady *Carr*'s caſe as unanſwerable; the reaſon aſſigned in the act reverſing the conviction and attainder being that they were founded on ſimilitude of hands. They inſiſted that the mere belief of a man who had not ſeen the priſoner write for fifteen years, nor received letters from him for five, was not evidence to affect a man's life. Nothing was more changeable than a man's hand-writing. No man could ſwear to his own hand for ſuch a length of time, and concluded with again urging the reverſal of *Sidney*'s attainder as an authority incontrovertible, and produced an atteſted copy thereof to the court. *Ante* 402.

Pengelly, Serjeant, and the *Attorney General*, *Sir Robert Raymond*, for the crown, anſwered, that later authorities than thoſe mentioned, and the conſtant courſe of evidence ſince, intitled them to read the papers offered as evidence, and cited lord *Preſton*'s caſe. Lady *Carr*'s caſe, they ſaid, did not ſupport the objection, becauſe the letters there produced were not in the direct inſtance of the perjury. As to the act reverſing *Sidney*'s attainder, it takes notice that a paper was found in the cloſet of *Sidney*, and was read, without proving it to be in his own hand-writing; but this paper was not found without an owning and acknowledging by the priſoner. He delivered it to Mr. *Maſon*, a witneſs, had it in his cuſtody, and it proceeded from him. They cited lord *Preſton*'s caſe in point, wherein there was only evidence of belief that ſome of the papers found on lord *Preſton* were in his hand, and they were read, though they were the expreſs overt acts laid in the indictment. The anſwers given by the priſoner at the council they conſidered as tantamount to a confeſſion. In Sir *Henry Vane*'s caſe the warrant given in evidence againſt him was proved by only one witneſs, who believed it to be his hand; but here is a particular fact which amounts to a confeſſion,

feſſion, and is proper evidence for the jury to conſider whether it be a confeſſion. They denied that any caſe could be ſhewn wherein it had been determined that proof of hand-writing by a witneſs who ſwears he has ſeen the perſon write, and he believes the paper produced to be his hand-writing is not a ſufficient proof in a criminal proſecution, that ſuch paper is in the defendant's hand writing—before lady *Carr*'s caſe. In all actions ſuch evidence hath been conſtantly allowed, and they aſked what law or what reaſon has made a difference between *civil* actions and *criminal* proſecutions? Lady *Carr*'s caſe is dark and obſcure. She was indicted for perjury in an anſwer in chancery. What is ſaid in her caſe about a letter does not appear at all to relate to the matter in iſſue; the determination muſt have been, that an anſwer in equity, on oath, ſhall not be falſified by a letter only under the party's hand, and that ſuch a letter ſhould not be ſufficient evidence to convict of perjury. As to colonel *Sidney*'s caſe, it did not appear that the paper found was intended to have been ſent out of his cloſet: but the reaſons recited in the act for reverſal of his attainder were accumulative; every ſtep taken in that attainder was complained of, and there is no particular ſtreſs laid on the proof of the paper. They then ſtated the act verbatim (*Ante* 402.) and agreed that the nature of the evidence they offered to prove the paper proffered to the court to be in the defendant's hand-writing, ſtood clear of any material objection that could be raiſed from the act. This paper was not barely proved by compariſon of hands; here is a witneſs who often *ſaw* him write, and ſwears it to be his hand-writing: beſides the queſtions propoſed to the priſoner and his anſwer amounts to a confeſſion.

Sir JOHN PRATT, C. J. It is proved by the witneſſes that theſe papers were in Mr. *Layer*'s poſſeſſion. That he delivered them to Mrs. *Maſon*, that ſhe locked them up in her trunk ſealed, as they were delivered to her by Mr. *Layer*, and afterwards taken out of her trunk by the meſſengers, ſo that if they reſted here, and no other evidence had been given, the papers ought to be read, as being *his* papers, which he *once* had in his poſſeſſion.

Can

Can any authority be more expreſs than the caſe of lord *Preſton*, where all the papers which were in his cuſtody and taken out of his cuſtody were read, without any offer of proof that they were his hand.

This goes further—the paper offered was not only found in his cuſtody, but it is a paper written in his own hand! How do you prove this?

The witneſs tells you he lived with the priſoner two years, afterwards he received letters from him about buſineſs, which buſineſs he did according to the directions of thoſe letters, and he believes the paper to be his hand. If they had gone no further, according to the uſual courſe of evidence, this paper ſhould be read. It is objected that the witneſs can not ſwear this, becauſe he did not ſee him write for fifteen years; but he received letters from him five years ago, and the character of theſe letters he compared with the paper, and from thence he believed that the character of the priſoner's writing is not changed. The witneſs alſo anſwered thoſe letters, and they were about buſineſs which he did for the priſoner, and for which he was paid; and, on the whole matter, he believes the writing to be his. This is confirmed by his own confeſſion: but if it had been an independent evidence, it is an evidence ſufficient to have this paper read; becauſe, if a witneſs ſwears to his belief of a hand-writing, it is always allowed to be read. It muſt be read as a paper that *was* in his cuſtody, and taken out of the cuſtody of one with whom he had depoſited it.

He agreed to the conſtruction on lady *Carr*'s caſe given by the counſel for the crown, and concluded with ſaying, that if the witneſs doubted, and could not form a belief whether it was his writing or no, it would not be evidence; for the witneſs muſt found his belief ſtronger, he muſt ſay, "I have *ſeen* him write, and I *know* his "writing, and therefore I believe it to be his hand."—And as to the circumſtance of length of time when he ſaw him write, that muſt be left to the jury. *6 St. Tr.* 284. 8 *Mod.* 82. *S. C.*

In the KING *v.* FLORENCE HENSEY, *Trinity*, 1 *Geo.* 2. *B. R.* indicted for high treaſon. *Morton* and *Howard*, the

the priſoner's counſel, took exception to the reading of two papers, being the rough draft of letters found in a bureau where the priſoner kept his linen and papers; and, which were only *introductory evidence*, not any part of the overt-acts which were to ſupport the ſpecies of treaſon charged upon him. It was objected that theſe papers were not ſufficiently proved to be found in his cuſtody, nor ſufficiently proved to be his hand-writing; for *mere compariſon of hands* is *not* ſufficient to ſupport their being read againſt the defendant.

The *Attorney* and *Solicitor General*, counſel for the crown, anſwered, that the papers being found in his cuſtody, and his hand-writing having been ſufficiently proved by perſons who had ſeen him write, it was ſufficient to intitle the crown to read them, though the jury are to judge of them. And they mentioned *Layer*'s caſe, and *Francia*'s caſe, and *Buchanan*'s caſe in the North, 1746, and *Creſby*'s caſe, *Skinn.* 578. 1 *Lord Raym.* 39. *S. C. Ante* . where compariſon of hands was allowed to be good evidence, if the papers are found in the cuſtody of the defendant himſelf. *Sir John Wedderburn's caſe. Foſt.* 22. 246. *Sir Cholmey Deering's caſe*, i. e. The *King* v. *Thornſide*.

The COURT unanimouſly over-ruled the objection. Theſe papers were found in his *cuſtody*, and they have been ſufficiently proved by perſons who have *ſeen* him write, to intitle the crown to read them. 1 *Burr.* 644.

So in the caſe of the KING *v.* DE LAMOTTE, *Old-Bailey ſeſſions*, 20 *Geo.* 3. indicted for high treaſon.

The counſel for the priſoner having firſt objected that ſimilarity of hand was no evidence.

The COURT admitted they were right, but ſaid the objection did not apply to the caſe. Similitude of hand-writing is, where a paper is produced *not* ſworn to by any perſon who has ſeen the priſoner write to be as the witneſs believes, his hand-writing; but infers it to be his hand-writing, becauſe it is like ſome other writing that is his. But that is not the evidence reſpecting the written papers offered to be read on this trial. They have all been proved by perſons not only acquainted with the priſoner's hand-writing, but who have ſeen him write,

and

and from that knowledge they ſay they believe the letters and other written papers are of his hand-writing, and that is the only evidence can be given, except it happens that there be a perſon who actually ſaw the priſoner write the very papers produced as the evidence. This kind of evidence has been received in Doctor *Henſey*'s caſe, and in many other caſes. *MS.*

In the KING (at the proſecution of JOHN TOLER Eſq.) *v.* JAMES NAPPER TANDY, at bar, *K. B. Ireland, Trinity*, 1792, before lord CLONMELL, C. J. BOYD and HEWIT, Juſtices. On an indictment preferred by the Attorney General by order of the Houſe of Commons, for provoking the ſaid *John Toler* to fight a duel.

Mr. *Toler* (now lord NORBURY, *Chief Juſt. Com. Pleas*) being aſked if he was acquainted with the hand-writing of Mr. *Tandy*, anſwered, "I have ſeen him write, and "have received letters from him. I was as well ac-"quainted with his hand-writing as with the hand-"writing of any man in the world."

Here a letter which colonel *Smyth*, Mr. *Tandy*'s friend, had delivered to Mr. *Toler* from Mr. *Tandy*, was offered in evidence.

The *Recorder* of Dublin, (now baron GEORGE) and *Mac Nally*, of counſel for the defendant, objected to this letter being read. They argued that as the evidence offered was merely upon compariſon of hands, and a ſuggeſtion that the letter came from the hands of Mr. *Smyth*, without any previous ground to ſhew it was ſent by Mr. *Tandy* to Mr. *Toler*, it could not be read. It was ſettled by concurrent authorities from the reverſal of *Algernon Sidney*'s attainder to the preſent caſe, that, in criminal proſecutions, compariſon of hand-writing is not evidence. Papers were read againſt *Sidney*, becauſe it was ſworn that they were found in his poſſeſſion, in his cloſet, and when he was preſent. So in *Henſey*'s caſe, the hand-writing was not only proved, but the treaſonable papers were found in his drawer or ſtopped on their way to the enemy. It was theſe concurrent circumſtances that formed the ground for reading the written papers in theſe caſes; that is, to ſimilarity of writing was added *poſſeſſion* of the papers: of courſe evidence of the hand-

writing of the paper offered can not be given until it is firſt proved to have come out of the hands of the defendant. They cited 3 *St. Tr.* 802. 2 *Hawk. P. C. ca.* 46. 2 *Bac. abr.* 313. *Viner abr. tit. Evid.* 243. *Theory of Evid.* 25. 1 *Burr.* 644. *Ante*

Boyd, J. This is not compariſon of hands. Mr. *Toler* ſays he knows the hand-writing. In *Sidney's* caſe there was one letter proved, and another given to the jury to compare with it.

The *Recorder* of Dublin anſwered: In that caſe the writing was proved by perſons who knew *Sidney's* hand-writing, perſons who had received indorſements from him; but the ground for reading was, that they were found in his poſſeſſion. *Ante*

Mac Nally added—and in *Henſey's* caſe and *De Lamotte's*, tried ſince in England for high treaſon, the papers read in evidence as being in the hand-writing of the priſoners, were proved to have been found in their poſſeſſion. *Ante*

The *Prime Serjeant (J. Fitzgerald)*, for the crown, anſwered—That even from the principles on which the objection was made, it could not be contended, that evidence of compariſon of hand-writing ſhould not be admitted in criminal caſes, though it may ſometimes be neceſſary to prove the papers in the cuſtody of the party, yet no caſe has been cited to ſhew that to prove the cuſtody is always neceſſary. In an indictment for ſending threatening letters, proof of the party's hand-writing, and of the letters coming by poſt, is evidence ſufficient for the jury. If the letter be ſent by the poſt to extort money, it will be received in evidence, though the hand-writing be never proved. The diſtinction, therefore, is unwarrantable, and it would be impoſſible ever to prove that offence if a man choſe to write in his cloſet and ſend the letter by poſt; for how could it be proved in his cuſtody? Then the only proof is ſimilitude of hand-writing, and that is matter proper for the conſideration of the jury. In caſes of treaſon and other capital caſes, the finding in the cuſtody, together with the hand-writing being proved, made the papers be received, as in *Layer's* caſe, lord *Preſton's* caſe, and *Henſey's* caſe. The hand-

writing

writing is proved by a perſon acquainted with it, and though the gentlemen have come armed *cap-a-pie* with authorities, they have not ſhewn a ſingle caſe where ſuch evidence was rejected for an offence not capital. He cited *Gilb. Evid. by Loft.* 54. *Ante* .

Emmet, for the defendant.—We are armed with ſuch a caſe; the caſe of the ſeven biſhops. The hand-writing of three of theſe great and good prelates were proved by witneſſes acquainted with their hand-writing; and if the diſtinction taken by the prime ſerjeant had any foundation, what would have been the conſequence? This—that the writing offered in evidence would have been proved againſt thoſe whoſe hands were proved, and not as againſt thoſe whoſe hands were not proved; but it was not read againſt any of them. What ſaid juſtice HOLLOWAY?—"that proof in criminal caſes ſhould be "ſtronger than in civil ſuits. There we go upon ſlight "proof, but in criminal caſes we require poſitive and "ſubſtantial proof. Is the evidence offered poſitive and "ſubſtantial proof, or any thing but belief?" Hearken to juſtice POWELL's expreſſion, who was the pride and pillar of the court: "Slender proof is admitted in civil "caſes; but in ſuch caſes as this, to admit evidence of "hand-writing by perſons acquainted with his hand-"writing, where is the ſafety of your life or the life of "any man here?" This was the caſe of miſdemeanor; the caſe of a libel. The firſt caſe where the doctrine as to ſimilitude of hand-writing is laid down, is lady *Carr's* caſe, obſcurely reported by *Siderfin*. But in perjury, proof of hand-writing is not allowed, and that deſtroys the diſtinction between caſes capital and not capital. All ſimilitude is compariſon, becauſe what does a man ſwear to, but that by knowing the character of the particular man, he believes the paper to be his writing, from the ſimilitude to or compariſon with thoſe characters. The witneſs ſwears to this letter by having ſeen others, and by comparing it with thoſe others. As to what is cited from the new edition of *Gilbert's Law of Evidence*, the part cited is not the text of the original, but the opinion of the editor, Mr. *Loft*, and is not law. He then cited *Hale, P. C.* Vide *Sidney's* caſe. *Ante* .

Frankland, for the crown.—Mr. juſtice *Buller*, who deſerves great attention, ſays, that in the caſe of high treaſon ſimilitude of writing is not ſufficient foundation for attainder, becauſe there muſt be proof of an overt-act: but, as corroborating and confirming evidence, even in high treaſon and other criminal proſecutions, as libels, proof of hand-writing is ſufficient, and it is not neceſſary to have ſeen the priſoner write. The caſe of the ſeven Biſhops turned on the witneſs not knowing the hand ſufficiently. *Ante* .

Lord CLONMELL.—There is no doubt, and my brethren agree with me that the evidence offered is admiſſible to the jury. See how it ſtands. This is an indictment for ſending a meſſage, provoking to fight. I, for one, think that evidence much weaker than this is, as ſtated by the witneſs, might be admitted. In the firſt place, if this be rejected, I defy all human ingenuity or exertion to furniſh evidence of ſending a challenge. Again, the man who delivers the challenge, the ſecond as he is called, he can not be expected to be in the power of the proſecutor. The man who delivers a written meſſage is himſelf an object of legal puniſhment: he cannot therefore be examined to criminate himſelf; but if he could, is it to be expected that he is in the power of the proſecutor? How is writing proved by a man who ſaw the priſoner write? What is the giſt of the proſecution? That he ſent a written challenge by *Smyth* his friend. The delivery of the meſſage is proved, and it is ſtronger here, becauſe the witneſs knows the hand-writing of the defendant. If this man aſſumed the character of friend to Mr. *Tandy*, you are open to it. In ſhort there are a variety of ways by which you can ſhew this letter not to be his hand-writing, if the facts will warrant it.

The letter was read. *Ridgeway's MS.*

In the ſame caſe.—Another letter being offered in evidence, *Emmet* again objected to the admiſſibility of ſimilitude of hand-writing. He conſidered the preſent point as differing from the former, but went at large into the law, as being common to both. *Hale* and others, he obſerved, held that compariſon of writing was not evi-

dence,

dence, but there was a different rule certainly laid down by *Buller* in his law of *Niſi Prius*. That rule was not fair, it proceeded on a falſe principle. The principle is falſe that makes a difference between the law of evidence reſpecting treaſon and any other criminal caſe, except in theſe inſtances, which confirm the general rule, that is where there is a poſitive ſtatute to make it evidence, or abſolute neceſſity. The diſtinction taken between caſes capital and thoſe that are not, is denied to be law by the moſt reſpectable authorities. It has been taken up from the *Obiter Dictum* of *Buller*, but is rejected by *Hawkins* and *Gilbert*. In five caſes only have letters been admitted, theſe are the caſes of *Sidney*, of *Henſey*, of *Francia*, of *Preſton*, and of *Layer*. They were rejected in the caſes of lady *Carr*, and of *Croſby*, and the ſeven Biſhops. In every caſe in which they were read, it was matter of no importance whether the writing was proved or not, except in *Sidney*'s caſe. In every other caſe whatever, where they were permitted to be read, there was ſome collateral circumſtance which rendered the proof of hand-writing immaterial. *Sidney*'s caſe was the only exception. There it was admitted to prove his hand-writing, but the reverſal of his attainder reverſed the principle and makes the intention of the legiſlature prohibit evidence of this kind in criminal caſes. The act reverſing that attainder recites that there was no proof of any treaſon againſt him, that the writing was not proved by any witneſs to have been written by him, not that it was not proved by comparifon of hands, for that was the caſe. Here therefore is a legiſlative authority that there muſt be poſitive proof. Subſtantial proof (in the words of Mr. juſtice *Holloway*) that the paper was actually written by him.

How is lord *Preſton*'s caſe? He was found in the act of committing treaſon, independent of thoſe letters which were read: he was arreſted going to aſſiſt the enemy at war with the king. The evidence was admitted not to the point for which he was going to be convicted, but as a collateral circumſtance, as matter of introduction. His papers were found near him, in the ſhip with him in which he was going to France: he expreſſed a ſtrong

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deſire to have them concealed. It was on that evidence they were read, and not becauſe they were written by him or proved to be ſo, but becauſe they were found by him, and upon that principle other letters, not in his hand-writing were alſo read. *Ante* .

Francia's caſe admits of the ſame obſervation as the former. The evidence conſiſted of a copying book, part in his hand-writing, part not; but both were read, becauſe before the privy council he confeſſed that the book contained copies of his letters, and explained them; wherefore the lord chief juſtice ſaid, it is not material whoſe the writing is when the priſoner has owned it to be copies of his letters. *St. Tr.*

In *Layer*'s caſe the ground of admiſſion was of the ſame nature. He uſed certain expreſſions before the council which were conſidered by the court as a confeſſion that the letters produced were his, and Mrs. *Maſon* proved ſhe received them from him; therefore beſides the circumſtance of hand-writing, there were others, his own confeſſion, and being found in his poſſeſſion. *St. Tr.*

I have not ſeen the caſe of *De Lamotte* cited by Mr. *Mac Nally*. *Henſey*'s caſe is the laſt. Some rough drafts of letters were produced againſt the priſoner, and what are the grounds upon which the court admitted them? The words of the court are theſe: "thoſe papers were found "in his cuſtody, and were proved by perſons who ſaw "him write." It reſted upon their having been found in his poſſeſſion, and upon that they were admitted. *Ante* .

In every one of the above caſes there are circumſtances to prove the defendant acquainted with the treaſonable proceedings; that the written papers flowed from them, and of conſequence they would have been admitted without any proof of the hand-writing.

In lady *Carr*'s caſe, in *Croſby*'s caſe, and in the caſe of the ſeven Biſhops, this evidence was rejected, and it is remarkably unfortunate for the diſtinction contended for, by the crown lawyers, between treaſon and other caſes, that two of theſe caſes were miſdemeanors—therefore their diſtinction is to be anſwered thus: All caſes

caſes in which this evidence was admitted, were caſes of treaſon; and of the caſes in which it was rejected, two were miſdemeanors. Lady *Carr*'s caſe, which *Siderfin* has obſcurely reported, is mentioned as an authority by *Algernon Sidney* himſelf in his defence. It comes from him with weight, though he was the party on trial; for had he recited it falſely, the impoſition would not have eſcaped lord chief juſtice *Jefferies* and the other judges; they were eager, ſhamefully eager to convict; they caught at every trifle that could affect the priſoner to his injury; but, they did not impeach the caſe: it was in the memory of them all, and therefore the ſtatement by *Sidney* may be conſidered an authentic report. *Jefferies* acquieſced in it, and *Sawyer* and *Finch*, the king's counſel, did not even attempt to contradict it. If it be now doubted, ſee what ſir *John Hawles* ſays of it in his account of *Sidney*'s trial: he ſays the evidence was irregular in proving the book produced to be the defendant's hand-writing, becauſe it was like what the witneſs ſaw him write, which is not evidence: and adverting to lady *Carr*'s caſe, he ſays it was well cited by *Sidney*, and therein it is reſolved that compariſon of hands is no evidence; and *Windham*, who is deſcribed as the ſecond beſt judge who ſat in Weſtminſter-hall, ſince the reſtoration to the revolution, was of that opinion. 4 *St. Tr.* 197. 6 *St. Tr.* 418.

The ſame caſe is mentioned, in the trial of the ſeven biſhops, by *Pollexfen*. He cites it from a note or from recollection, for he mentions facts not noticed by *Siderfin*, and the court rejected and gave judgment that ſimilitude of hand-writing was no evidence; becauſe, ſay they, it is ſo eaſy a thing for a man's hand to be counterfeited. That caſe of Lady *Carr* is particularly relied on as the caſe of the ſeven biſhops. The hand-writing was there proved by perſons who had ſeen them write, and yet it was not admitted; becauſe, ſays *Holloway*, it was neceſſary to have ſubſtantial proof. In *Croſby*'s caſe the priſoner was acquitted, upon producing the reverſal of *Sidney*'s attainder in parliament; ſo that here there is a diſtinction between this and the former caſe. Here there is no evidence that the letter was ſent

by

by Mr. *Tandy* to Mr. *Toler*. What is the conſequence? Suppoſe for a moment that he wrote it; that it is proved by perſons who ſaw him write; the inference is, he *wrote* it, therefore he *ſent* it. That can be but matter of *preſumption*: and the law of preſumption is this, the *fact* to ground the preſumption muſt be proved; but evidence upon *belief* can never be received to ground a preſumption. The fact of *writing* is not the crime, it is the *ſending*; therefore what is offered is a light and raſh preſumption; and raſh it would be, indeed, for a jury to found a verdict of guilty on this evidence—evidence that admits you may go as far back as you pleaſe to raiſe a preſumption.—Will the jury ſay this—we believe Mr. *Tandy* ſent the letter, becauſe the witneſs believes he *wrote* it; and the witneſs believes he wrote it becauſe it is *like* what he has ſeen him write.

Lord CLONMELL, C. J. I have aſked my brothers if they had any doubt; they are clear that this is evidence admiſſible to the jury. I know not what the letter contains; it may go in exculpation of the defendant. I gave my opinion before, and my brothers concurred in it. How are the facts? Mr. *Tandy* entered into a correſpondence with Mr. *Toler*: he diſcontinued for ſome time. Mr. *Toler* received another letter; perhaps it may appear to the jury it was not his work. It may ſhew that what was before expreſſed were not his ſentiments, but that his intention was different. Let the letter be read: and it was read.—The defendant was acquitted. *Ridgeway's Rep. MS.*

The ſame rule was followed in the KING *v.* the rev. WILLIAM JACKSON, tried for treaſon, *B. R. Ireland*, 1795. The priſoner's hand-writing being proved by *Cockayne*, who had ſeen him write, and who ſwore the papers produced were, he believed, in his hand-writing. A letter found in the ſtudy of Mr. *Stone*, at *Hertford*, in *England*, was admitted in evidence againſt him. *Sampſon's Rep. of the trial.* Vide *ca. on* CONSPIRACY. *Poſt* .

And on the trial of *Henry* and *John Shears*, eſqrs. at a *commiſſion of Oyer and Terminer*, *Dublin*, *July*, 1798, a paper found in an open deſk in the houſe of *Henry Shears* was admitted as evidence againſt both; *John Dwyer* having

having firſt ſworn that he had ſeen *John Shears* write, and believed the paper to be in his hand-writing. *Ridgeway's Rep.*

Rule the Third.

In proving the hand-writing of a defendant, there is no diſtinction between that which is legal evidence in a civil action and that which is legal evidence in a criminal proſecution; that which is evidence in the one, whether a capital offence or miſdemeanor, being evidence in the other.

So ruled in the caſes of doctor *Henſey* and *De Lamotte* above cited, in the former of which caſes Lord MANSFIELD, C. J. ſays, "It is the common caſe of proving a "man's hand-writing, which is done every day between "party and party." Of courſe the following caſes are illuſtrative of the antecedent rules.

BROADHEAD *v.* WOODLEY, Clerk, *coram* YEATES, J. *B. R. Worceſter ſpring aſſizes*, 1770.

In prohibition, the plaintiff in ſupport of a *modus* produced in evidence a paper writing, being a particular of tithes, &c. in order to ſhew that this was the writing of the deceaſed rector whoſe name it bore; the plaintiff's counſel offered to produce many of the returns to the ſpiritual court of births and burials made in the time of that rector, and ſigned with his name; and upon comparing this entry with thoſe returns, it was ſaid it would appear that the hand-writing was the ſame. The rector had been dead many years.

YEATES, J. I have no doubt to reject this evidence as not admiſſible. I do not know any caſe where compariſon of hands has been allowed to be evidence at all. No trial can be decided by opinion and ſpeculation, but by evidence, where a witneſs has ſeen the party write, and ſpeaks to his belief of that writing, which is produced in evidence. But where it is merely opinion on the ſimilitude of the writing collected from barely comparing them, the jury may compare them as well as any body elſe, and any two people may think differently. In an indictment for forgery, the evidence of a perſon who

ſubject of much debate. In Mr. *Sidney*'s caſe it was ſaid (by *Jefferies*, C. J.) *ſcribere eſt agere.* This is undoubtedly true under proper limitations, but it was not applicable to his caſe. Writing being a deliberate act and capable of ſatisfactory proof, certainly may, under ſome circumſtances, with publication, be an overt-act of treaſon; and had the papers found in Mr. *Sidney*'s cloſet been plainly relative to the other treaſonable practices charged in the indictment, they might have been read againſt him, though not publiſhed. *Foſt.* 198.

BLACKSTONE commenting on the ſame point of evidence, and contemplating *Sidney*'s caſe, ſupports the opinion of *Foſter*, after ſhewing that words ſpoken, however wicked, can not be treaſon, unleſs by ſome particular ſtatute, he ſays, "yet, if they be ſet down in writing, "it argues more deliberate intention; and it has been "held that writing is an overt act of treaſon; for, "*ſcribere eſt agere.*" But even in this caſe the bare words are not the treaſon, but the deliberate act of writing them. And ſuch writing, though unpubliſhed, has in ſome arbitrary reigns, convicted its author of treaſon: particularly in the caſe of *Peachum*, a clergyman, for treaſonable paſſages in a ſermon never preached. And *Algernon Sidney*, for ſome papers found in his cloſet: which, had they been plainly relative to any previous formed deſign of dethroning or murdering the king, might doubtleſsly have been properly read in evidence as overt-acts of that treaſon which was ſpecially laid in the indictment. But being merely ſpeculative, without any intention, ſo far as appeared, of making any public uſe of them, the convicting the author of treaſon, upon ſuch an inſufficient foundation, has been univerſally diſapproved: *Peachum* was, therefore, pardoned; and though *Sidney*, indeed, was executed, yet it was to the general diſcontent of the nation, and his attainder was afterwards reverſed by parliament. (Vide *ante* .) There was then no manner of doubt but that the publication of ſuch a treaſonable writing, was a ſufficient overt-act of treaſon at the common law, though of late even that has been queſtioned. 4 *Blackſ. Com.* 81.

FOSTER,

FOSTER, whoſe judgment *Blackſtone* has, in a great meaſure, adopted, ſeems to found his opinion on *Hale*, who follows *Coke*. *Hale* ſays, "thoſe words, which "being ſpoken, will not make an overt-act to make good "an indictment of compaſſing the king's death; yet, if "they are reduced into writing by the delinquent, either "in letters or books, and publiſhed; they will make an "overt-act in the writer to make good ſuch an indictment "if the matter contained in them impart ſuch a com-"paſſing." *Co. Pl. Cr.* 14. 1 *Hale's Pl. Cr.* 118.

FOSTER proceeds: the papers found in lord *Preſton's* cuſtody (on board a ſmack on the Thames, on his way to France) thoſe found where Mr. *Layer* had lodged them, the intercepted letters of Doctor *Henſey*, were all read in evidence, as overt-acts of the treaſon reſpectively charged on them, and *William Gregg*'s interrupted letter might in like manner have been read in evidence if he had put himſelf on his trial. *Foſter*, 198. So in *De Lamotte's* caſe, *ante* . and the rev. *William Jackſon's caſe*, *B. R. Ireland*. *Ante* .

For thoſe papers and letters were written in proſecution of certain determinate purpoſes which were all treaſonable, and then in contemplation of the offenders, and were plainly connected with them. But papers incapable of ſuch connexion while they remain in the hands of the author *unpubliſhed*, as Mr. *Sidney*'s did, will not make a man a traitor: and, lord *Hale*, in the place laſt cited, mentioneth two circumſtances as concurrent to make words reduced into writing, overt-act of compaſſing the king's death, that they be *publiſhed*, and that they *impart ſuch compaſſing*. *Foſter*, 198. Vide *the King v. James Napper Tandy*. *Ante* .

Rule the Third.

Letters wrote and forwarded on their way, for the purpoſe of a treaſonable correſpondence, whether found in the poſſeſſion of the defendant, or intercepted or ſtopped in the poſt-office, may be read in evidence againſt him on a charge of levying war, adhering to the king's enemy,

enemy, or compaſſing the king's death, to prove the treaſon.

As in LORD PRESTON's caſe, before cited, papers found in his cuſtody after he had gone on board a boat, on the *Thames*, and was in the act of going abroad, and his conduct evinced evident circumſtances of fear and concealment, which argued the intent of his voyage to be of the like nature with that which the letters were called for to prove, and therefore they were read *without* proof of hand-writing.

On this caſe of lord *Preſton* it is juſtly remarked, by Mr. *Loft*, that the point *there* was not as it has been ſometimes ſuppoſed, a caſe of mere cuſtody, as in *Sydney*'s caſe; but a caſe of cuſtody and *conveyance* connected with the overt-act laid in the indictment of paſſing on the ſea, and departing towards the kingdom of *France*, with intent "to deliver the traiterous inſtruc-"tions in the ſaid letters contained, to the king's ene-"mies, in the ſaid kingdom then at war with England." *Gilb. Evid. by Loft.* 787, 788.

In Doctor HENSEY's caſe, evidence was given of intercepted letters, the hand-writing of the defendant having been previouſly proved. 1 *Burr.* 646. *Ante* .

And this evidence was received on the authority of *Gregg*'s caſe.

So in the KING, *v.* the rev. WILLIAM JACKSON, *B. R. Ireland, Eaſter* 1795.

Mc. Lean, a king's meſſenger, produced a paper found by him in the poſſeſſion of Mr. *William Stone*, of Old-Ford, England.

Ponſonby, of counſel for the priſoner, objected to the reading of this paper, becauſe it was neither found in the priſoner's cuſtody, nor in the county, nor even in the kingdom where the treaſon was charged to have been committed, and inſiſted that the bare hand-writing without any thing elſe, had never been held to be evidence; and that the rule *ſcribere eſt agere* (which lord CLONMELL ſaid was the rule) was never laid down in general terms but in *Algernon Sidney*'s caſe, where the attainder was afterwards reverſed by parliament.

The

The *Attorney General*, (right hon. *Arthur Wolfe*,) now lord KILWARDEN, C. J. B. R. anſwered, there is an overt-act laid, to ſupport which two papers are proved in order to ſhew the purpoſe of the priſoner, who is the writer, and to give credit to his carrying on a correſpondence with the two perſons to whom thoſe papers are directed. With that view we offer a paper in the hand-writing of the priſoner, found among the papers of his correſpondent *William Stone*, in England, informing him that he was arrived in Ireland, warning him to make no further uſe of the former addreſſes on his letters, and other circumſtances tending to ſhew that he was the medium through which ſuch correſpondence paſſed to France. We do not contend that this is to be given in evidence ſubſtantially and ſtanding by itſelf, but in ſupport of the facts ſtated. The legal diſtinction is, where a man writes a paper and parts with it, ſuch paper is evidence againſt him. It is not offered now as an evidence of an overt-act, but as a piece of evidence coming from the party accuſed, to be made uſe of currently with other evidence to the ſame effect, and therefore it ſhould be read. Vide *Henſey's caſe*. *Ante* .

Ponſonby, in reply. This, like every other matter offered in evidence, whether oral or written, is either legal or not. It will not do to ſay it is to make a part of the overt-act, or to confirm the overt-act. An overt-act can not be ſuſtantiated by three or four, or nine or ten, or any number of pieces of paper, unleſs each is in itſelf legal and admiſſible evidence; it can not be pieced up in the manner attempted on the part of the crown. And this paper is not proved ever to have been publiſhed by the priſoner, nor even to have been in the kingdom of Ireland, much leſs in the county where he is charged to have committed the treaſon. What was the determination in lord *Preſton's* caſe? It was there thought neceſſary that there ſhould be an overt-act in the county where the crime was committed; and, the court confirmed this objection, in general by ſhewing, as a reaſon why in that inſtance it could not avail on account of the defendant's having taken boat in *Middleſex*, in purſuance of his treaſonable deſign, which they held ſufficient of an overt-

act in Middleſex, already proved in the county without reſting upon the papers found elſewhere.

Downs, J. Lord *Preſton* took boat in *Middleſex*, with the papers on him. And were not the papers admitted againſt him in *Middleſex*, where the indictment was laid, becauſe they were evidence ſhewing the *intention* with which he committed the overt-act in *Middleſex*, namely, the taking boat to go to France.

Clonmell, C. J. There is nothing ſaid that does not aſſimilate this caſe to the caſe of the *King* againſt *Henſey*. The evidence offered is either introductory or corroborative. Introductory to what? To one of the counts in the indictment; either for adhering to the king's enemies, or compaſſing his death. What then is the evidence? That he had given information to the enemy, in order that they might invade the country. You, (the priſoner's counſel) may, perhaps, be able to explain that. Papers are found, and it can not be denied, in the hand-writing of your client and in the hands of his correſpondent, to whom, it is proved, that he wrote letters. Therefore this is evidence. How far the contents may go in explanation, or contradiction, can only appear by reading the letter.

Chamberlaine, J. This is read only to ſhew *quo animo* the letter was directed to *Stone*; and being in the hand-writing of the priſoner is evidence to go to the jury. The only queſtion is, whether a paper in his hand-writing in *England* may not be read to explain that which he has done in Ireland. The court over-ruled the objection. *Sampſon's Report of Jackſon's tri.* 57, 58.

In the ſame caſe—After ſome objection by the priſoner's counſel founded on the rule that the beſt evidence the caſe admits of muſt be produced; the court directed to be read a letter in the hand-writing of Mr. *Holford Stone*, at *Paris*, to Mr. *Horne Tooke*, in *London*, to ſhew the whole connection of a correſpondence previouſly proved. The *Attorney General* having in anſwer to the objection made, obſerved that it was the beſt evidence, and that there could be no better; Mr. *Holford Stone* being out of the reach of the proceſs of the court, and, even were he not, he could not be examined to criminate

criminate himſelf. But at all events the paper offered having been got on the priſoner's table in Dublin, that is in his poſſeſſion, it was clearly admiſſible evidence againſt him. *Sampſon's Rep. Jackſon's tri.* 64.

Lord CLONMELL, C. J. in charging the jury in the ſame caſe ſaid, and DOWNS and CHAMBERLAINE, juſtices, concurred, that letters of advice and correſpondence of intelligence to the enemy, to enable them to annoy this country, or defend themſelves, written and ſent in order to be delivered to the enemy, are, though *intercepted* in their progreſs, overt-acts of treaſon in compaſſing the death of the king, and of adhering to his enemies. And then adverting to the caſe of *Gregg*, before cited, he added, that ſo it had been determined by all the judges of *England* in that caſe, where the indictment bore ſtrong reſemblance to the preſent. It was true, in the preſent caſe, the letters given in evidence had never reached their intended deſtination, but were ſtopped in the poſt-office; but that does not alter the caſe: and the reaſon is obvious and clear, for were that the caſe, no traitor could at any time be indicted, however miſchievous the treaſon, unleſs the letters written by him, or attempted to be tranſmitted by him, had gone to and been received by the perſon for whom they were intended; in which caſe the traitor could never be laid hold of, until at leaſt after the miſchief was done. *Sampſon's Report of Jackſon's trial*, 87.

CHAPTER III.

Of written Evidence from the Records and Proceedings of Courts of Law, Equity, and other Courts having competent juriſdiction.

Rule the Firſt.

THE final ſentence, decree, or judgment of any foreign court which hath competent juriſdiction of the ſubject determined before them, is concluſive evidence

in any other court of concurrent juriſdiction; and therefore an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the ſame offence in England.

It is a bar, ſays BULLER, *juſtice, B. R.* becauſe a final determination in a court having competent juriſdiction is concluſive in all courts of concurrent juriſdiction. Therefore if *A.* having killed a perſon in *Spain*, were there proſecuted, tried, and acquitted, and afterwards indicted in England, he might plead the acquittal in *Spain* in bar. *Buller's N. P.* 245.

So in the KING *v.* HUTCHINSON, 29 *Car.* 2, *(cited in* BEAK *v.* THYRWHIT, *Eaſter*, 4 *Jac.* 2. *B. R. anno* 1688.) The defendant had killed a perſon named *Colſon*, in *Portugal*, and was acquitted there of the murder; being afterwards apprehended in *England* for the ſame fact, he was brought into the court of King's Bench by *habeas corpus*, where he produced an exemplification of the record of his acquittal in *Portugal*; but the king being very willing to have him tried in *England* for the ſame offence, it was referred to the conſideration of the judges, who all agreed that as he had been already acquitted of the charge by the law of *Portugal*, he could not be tried again for it in *England*, 3 *Mod.* 194. Vide *Beake* v. *Tyrrel. S. C.* 1 *Shower*, 6. *Eaſt.* 1 *Will. & Mary.*

In the KING *v.* DAVID ROACHE, *Old-Bailey, December Seſſions*, 1775, the ſame point is recognized as law. The defendant was tried at a ſpecial commiſſion before BURLAND, *baron*, ASTON, *juſtice*, and GLYNN, *ſerjeant and recorder of London*, for the murder of *John Ferguſon*, at the *Cape of Good-Hope*, on the coaſt of *Africa*.

The indictment was founded on *ſtat.* 33 *Hen.* 8. *ca.* 23. The priſoner pleaded *auter foit acquit* before *Olaff Martini Begg*, provincial fiſcal of the ſupreme court of criminal juriſprudence there: but withdrew his plea in bar, put in the general iſſue, and was acquitted. *Leach Cr. Ca.* 2 *edit.* 125. 3 *edit.* 160.

But the ſentence of a civil or eccleſiaſtical court can not be pleaded in bar in a court of common law to an indictment; nor is ſuch ſentence evidence on a proſecution for an offence at common law, or by ſtatute.

Therefore to forge a will, is a capital offence, although the ſuppoſed teſtator is living; and although at the time of the trial the probate was not recalled.

As in the KING, *v.* JOHN STERLING, *Old Bailey, September Seſſions*, 1773, 13 *Geo.* 3. before NARES and ASHURST, Juſtices, and GLYNN, *Serjeant* and *Recorder* of *London*.

The indictment was for forging the laſt will and teſtament of *Elizabeth Shuter*, ſpinſter, with intention to defraud the South-Sea company; with five other counts for uttering and publiſhing the ſaid will, knowing it to be forged, and charging the priſoner with an intention to defraud, firſt, *Elizabeth Shuter*; and ſecondly, *Daniel Crofts*.

The circumſtances were—The priſoner *John Stirling* was a young man inhabiting chambers in the temple; and *Elizabeth Shuter*, the ſuppoſed teſtatrix of the will, was his laundreſs. On the twentieth of February, 1773, the priſoner applied to the clerk of one *Biſhop*, a proctor in Doctor's Commons, in order to prove the will of Mrs. *Shuter*, whom he repreſented to have lived at *Tooting*, in *Surrey*. He accordingly took the oath before the ſurrogate, and the probate of the will was made out, and delivered to him. On the twenty-ſecond of February, he took the probate of the will to the South-Sea houſe, and entered it there with the proper clerks, in conſequence of which, on the twenty-fifth, he went to the proper offices, and ſold out £350 ſtock.

The will was produced in evidence, in which Mrs. *Shuter* was made to give to her "dear maſter and very "good friend *John Sterling*, of the middle temple, ſole "executor, £350, South-Sea annuities, and all her other "eſtates and effects in truſt to make ſale of, &c. and "out of the money ariſing from ſuch ſale, to pay all "her

" her juſt debts, &c. then to retain for his own benefit " £30 for his trouble as executor, and divide the re- " ſidue among her relations," who were ſpecified: and it purported to be ſigned and delivered by her in the preſence of two witneſſes.

It appeared on the trial that the *probate* was *not recalled.*

Elizabeth Shuter was herſelf produced to prove that the ſignature to the will was not her hand-writing, and the jury found the priſoner guilty.

The judgment was however reſpited on a doubt, whether as the ſuppoſed teſtatrix was living, the priſoner was legally convicted of having forged her *laſt will* and teſtament, there being no ſuch inſtrument as a laſt will and teſtament in contemplation of law until after the death of the perſon making it.

But upon the authority of the caſe of *Ann Lewis*, the judges were unanimouſly of opinion that an inſtrument may be the ſubject of forgery, although in fact it ſhould appear impoſſible for ſuch an inſtrument as the inſtrument forged to exiſt, provided the inſtrument purports on the face of it to be good and valid as to the purpoſes for which it was intended to be made. The priſoner received ſentence of death. *Leach. Cr. Ca.* 2 *edit.* 95. 3 *edit.* 117. *Foſt.* 116. Vide *Murphy's caſe*, 10 *St. Tr.* 183. *Poſt*

NOTE.—In the Dutcheſs of KINGSTON's caſe which follows, all the caſes relevant to this point are cited, applied, and argued on.

Rule the Third.

A ſentence in the ſpiritual court againſt a marriage, in a ſuit for jactitation of marriage, is not concluſive evidence to ſtop the crown from proving the ſame marriage in an indictment for polygamy; for the validity of ſuch ſentence may be impeached for having been obtained by fraud.

So ruled in the trial of *Elizabeth dutcheſs of* KINGSTON, before the LORDS of *Great Britain*, *April*, 1776, 16 *Geo.* 3.

The facts on which the indictment was founded were:

Elizabeth

Elizabeth Chudleigh, daughter of colonel *Thomas Chudleigh*, of Chelſea college, was married to the honorable *Auguſtus John Hervey*, (afterwards earl of Briſtol) on the fourth of Auguſt, 1744, at the pariſh church of Lainſton, in the county of Southampton, as appears by the regiſter of that place.

On the ninth of November, 1768, ſhe inſtituted a ſuit of *jactitation* of marriage againſt Mr. *Hervey*, in the conſiſtory court of the biſhop of London, and on the tenth of February, 1769, ſentence was pronounced, "that "the ſaid *Elizabeth Chudleigh* was and now is a ſpinſter, "and free from all matrimonial contracts and eſpouſals "with the ſaid *Auguſtus John Hervey*."

On the eighth of March, 1769, Miſs *Chudleigh* was married, by ſpecial licence from the archbiſhop of Canterbury, to *Evelyn Pierpoint*, duke of Kingſton. And on the ninth of January, 1775, an indictment of polygamy was found at Hicks's-hall, county of Middleſex, charging, "that *Elizabeth* the wife of *Auguſtus John* "*Hervey*, eſq. of Hanover-ſquare, in the county of *Mid-* "*dleſex*, being then married, and then the wife of the "ſaid *Auguſtus*, feloniouſly did marry and take to huſ- "band *Evelyn Pierpoint*, duke of Kingſton, the ſaid *Au-* "*guſtus John Hervey* being then alive, &c."

The proceeding being removed into the court of King's Bench by writ of *certiorari*, dated the eighteenth of May, 1775; this writ was ſuperceded, and on the eleventh of November, 1776, another writ of *certiorari*, ſigned YORK, iſſued to remove the proceedings before the king in parliament.

On the fifteenth of April, 1776, the defendant was brought to trial before the lords. She pleaded *not guilty* to the indictment, and immediately addreſſed the lords thus: "My lords, the ſuppoſed marriage in the indict- "ment with Mr. *Hervey*, which is the ground of the "charge againſt me, was inſiſted upon by him in a ſuit "inſtituted by me in the conſiſtory court of the right "reverend lord biſhop of London, by the ſentence of "which court ſtill in force, it was pronounced, decreed, "and declared, that I was free from all matrimonial "contracts

" contracts or eſpouſals with the ſaid Mr. *Hervey*; and, " my lords, I am adviſed that this ſentence, which I " now deſire leave to offer to your lordſhips, (remaining " unreverſed and unimpeached) is concluſive, and that " no other evidence ought to be received or ſtated to " your lordſhips reſpecting ſuch pretended marriage."

The *Attorney General, (Thurlow)* firſt inſiſting on a reſervation of his right to object to the proceedings in the jactitation cauſe whenever they ſhould be offered *in evidence*, conſented that the whole proceedings ſhould be read; that is, the original allegation of *Elizabeth Chudleigh*; the croſs allegation delivered in by Mr. *Hervey*; her anſwer; the articles on which the proofs were taken; the depoſitions, and the ſentence: and the lords then permitted the proceedings and ſentence to be read, *de bene eſſe*; and by the ſentence it appeared that the defendant was declared free from all matrimonial contracts and eſpouſals with Mr. *Hervey*.

Mr. *Wallace*, for defendant, ſubmitted. This ſentence is concluſive, as long as it remains in force; and of neceſſity it muſt be received in evidence in all courts and in all places where the ſubject of the marriage can become a matter of diſpute. The conſtitution of the kingdom has placed the deciſions of the rights of marriage ſolely in the eccleſiaſtical court. The common law courts have no ſuch original juriſdiction; though marriages may come incidentally before them: but where the proper forum has given deciſion upon the point, the common law courts have never examined into the grounds or queſtioned the validity of the ſentence. He cited a caſe of *jactitation* in the arches, in the reign of *Will.* 3. *Carthew* 225. *Bunting* v. *Addingſhall.* 27 *Eliz.* 4 *Co.* 29. *Kenn's caſe*, 7 *Rep.* 41. *Blackham's caſe*, 1 *Salk.* 290. *Hatfield* and *Hatfield. Viner. tit. Marriage. Before the lords of England. Clews* v. *Bathurſt*, 2 *Stra.* 960. *De Coſta* v. *Villa Real*, 2. *Stra.* 961.

The above caſes, he obſerved, reſpected caſes of marriage, but the juriſdiction of the eccleſiaſtical courts was the ſame in other inſtances; as in the probate of wills, and granting letters of adminiſtration. He cited *Noel* v. *Wells*,

Wells, 19 *Car.* 2. 1 *Lev.* 235. *and Branſby* v. *Kennick*, 1718. *before the lords, an Appeal from Chancery.*

He then argued that the ſame rules obtain with reſpect to every court of competent juriſdiction, whether foreign or domeſtic. The common law courts give credit to the deciſions of all foreign courts of points within their proper juriſdiction, and do not examine into the facts, but are concluded by the ſentence. In ſupport of this rule he cited,

HUGHES v. CORNELIUS, *B. R.* on a judgment of the French admiralty, *Mich.* 34 *Car.* 2. *Sir Thomas Raym.* 473.

It is the ſame in caſe of inſurance; and in reſpect to the courts of admiralty; whether prize or not prize, belongs to that court, the juriſdiction of that court decides upon the ſubject.

So the local cuſtoms of foreign countries. *Burrow* v. *Jamieno*, 1 *Stra.* 233.

He inſiſted that in almoſt every caſe where judgments or records of other courts have been the ſubject of diſcuſſion, the ſentences of the eccleſiaſtical court have always been cited and argued, as concluſive upon the ſubject in diſpute, and the courts have uniformly adopted thoſe caſes at law; but the attempt has ever been to diſtinguiſh caſes immediately before the court from thoſe determined by the eccleſiaſtical juriſdiction. So in *Philips* v. *Bury*. *Skinn.* 468.

He next cited BIDDULPH FARMER v. ATHER. *Trinity*, 28 & 29 *Geo.* 2. *Com. B.* In which caſe the chief juſtice ſaid—If there is a ſentence in an eccleſiaſtical court declaring a marriage, if it could be proved by a hundred witneſſes that the parties were never within five hundred miles of each other, the evidence is not to be received, but the judgment of the eccleſiaſtical court is concluſive upon the point. 2 *Wilſ.* 23.

He then obſerved that though the caſes he had cited reſpected civil ſuits, yet no real ground of diſtinction could be made between *criminal* and *civil* proceedings. In civil ſuits, courts go as far as poſſible to relieve claims founded in equity and juſtice: in criminal caſes, the leaning is always to the defendant, and therefore ſuch

evidence is ſtronger in a criminal proſecution. In ſupport of this he cited—

The KING *v.* VINCENT. *Old-Bailey*, 8 *Geo.* 1. Indictment for forging a will of a perſonal eſtate. On the trial the forgery was proved, but the defendant producing a probate, that was held to be concluſive evidence in ſupport of the will, and the defendant was acquitted. 1 *Strange* 481. But vide the KING *v.* STERLING. *Ante*

KING *v.* RHODES, 12 *Geo.* 1. *B. R.* The ſame doctrine was held. Defendant exhibited a bill in *Doctors Commons*, as executor, and demanded probate. After long conteſt it was determined in favour of the will; and upon an appeal to the delegates this ſentence was confirmed. After the ſentence, the parties who brought it about fell out, and diſcovered that the will which had been proved was a forgery. The manner of giving relief was to grant a commiſſion of review; but the perſon who had been injured and diſappointed by this forgery, alſo preferred a bill of indictment againſt the perſons concerned in the act of forgery. The Chief Juſtice refuſed to try the cauſe whilſt the ſentence was in force; but inſiſted that it ſhould ſtand off until the ſentence was laid out of the caſe by the deciſion of the commiſſioners under that commiſſion of review. 1 *Strange* 703. Vide the KING *v.* STERLING. *Ante* 429.

The KING *v.* GARDELL was alſo in point. It was an indictment proſecuted by Mr. *Crawford*, a fellow-commoner of *Queen's College*, for an aſſault. At the trial the defendant, who had acted by orders of the college, produced the acts of the college, by which *Crawford* had been expelled. The JUDGE declared, that as the college had the ſole juriſdiction of the cauſe, their deciſion was concluſive upon him; and it did not ſignify upon what grounds they had gone; for the effect of their judgment was an excuſe for the defendant, and ſo long as it remained unimpeached and unreverſed, there could be no doubt but it furniſhed protection to the defendant, or to ſpeak more properly, a defence againſt the indictment. The cauſe was brought before the *King's Bench*, and the judges there were unanimouſly of opinion that the court had

had done right at the trial of the cauſe to reject all evidence upon the ground of theſe acts of expulſion; that the acts themſelves, being within the juriſdiction of the college, were ſufficient for the defendant to avail himſelf of, and that it was not competent to the proſecutor of that indictment to ſhew to the court that theſe were not regularly or orderly done, or that they were invalid in any reſpect whatſoever. And in that caſe the general doctrine was recognized, that in all courts of competent juriſdiction, their acts, however wrong they are, yet while they remain in force, are concluſive upon every other court: the caſes of eccleſiaſtical ſentences, and many others, were then mentioned.

He called the attention of the lords to the caſes in *Exchequer* ſeizures, where condemnations are given conſtantly almoſt without a defence, and yet all other courts are concluded by them: and under all thoſe authorities, for a ſucceſſion of ages, he reſted that the court would conceive that the ſentence of the eccleſiaſtical court produced, in a caſe clearly within their juriſdiction, in a caſe in which they had the ſole juriſdiction, was concluſive.

Mr. *Mansfield*, on the ſame ſide, ſtated the proceedings in the eccleſiaſtical court in obtaining the ſentence of jactitation: and argued that if that ſentence had the force which it was apprehended it muſt have, it would of courſe follow that the indictment muſt fall to the ground; becauſe the ſole foundation of the criminal charge being the ſuppoſed marriage of the defendant with Mr. *Hervey*, this ſentence, if concluſive, unanſwerably proves ſuch marriage never exiſted. Then it follows, as a conſequence, that this is the proper place and point of time to ſtop the trial. Evidence ought not to be heard, if this ſentence is concluſive, becauſe it would be hearing that which could have no intention, no weight, no conſequence, ſo it would be nugatory to ſtate it.

To ſhew that the ſentence was concluſive, he took into conſideration the ſtatute on which the proſecution was founded, and the ſtate of the law before it was enacted. The act creates no new offence. It puniſhes nothing but what was puniſhable before, a ſecond marriage, while a

former exiſted; and this has been an offence as long as the eccleſiaſtical conſtitution of this country has ſubſiſted. The ſtatute makes no other alteration in the law, but as it ſubjects perſons committing this offence to temporal proſecution and puniſhment before this act, ſuch an offence could only be the object of eccleſiaſtical cenſure and puniſhment; and the ſtatute never intended to break in upon or alter the rights of the eccleſiaſtical courts. The preamble ſhews it was not the intent of the legiſlature that a ſecond marriage ſhould be the object of puniſhment where there had been a ſentence which prevented a ſuppoſed former marriage being binding upon the parties. The preamble ſays, that divers evil-diſpoſed perſons being married, run out of one country into another, or into places where they are not known, and there become to be married, having another huſband or wife living, to the great diſpleaſure of God and utter undoing of divers honeſt mens' children and others. But it never was ſuppoſed by the makers of the ſtatute that the perſons deſcribed in the preamble would go through the form and ceremony of a trial, and obtain a deciſion in the eccleſiaſtical court before ſuch ſecond marriage was to take effect: but it is enough that in this act there is not any thing that tends to diminiſh or break in upon the dominion of the eccleſiaſtical courts, but that the ſtatute left thoſe courts, and the law relating to them, juſt in the ſame ſituation as they were before. Now if this was an offence before the act, how was it puniſhable? What would have been the operation of ſuch a ſentence before this law? Unqueſtionably a perſon taking a ſecond huſband or wife, the firſt being living, might have been made the ſubject of puniſhment in the eccleſiaſtical courts; but ſo long as the ſentence remained, the relation of huſband and wife could not exiſt, which alone muſt be the foundation of a proſecution: for the offence of taking a ſecond huſband upon this ſtatute, the act upon which the whole proceeding is founded having made no alteration in the caſe, the law remains the ſame. Yet ſuch a ſentence in the eccleſiaſtical court would not have made adultery lawful, or have made a marriage with a ſecond huſband or wife a good one; but

but while the ſentence ſubſiſted, it would have proved that there was no firſt marriage at any time by any parties intereſted. Such a ſentence as this may, however, be undone; for it is a fundamental rule in the eccleſiaſtical courts, that *ſententia contra matrimonium non tranſibit in rem judicatam.*

He then pointed out that the courts eccleſiaſtical might, on the application of any perſon intereſted, allow the inſtitution of a new ſuit to ſet aſide a former ſentence, and on new evidence eſtabliſh the marriage formerly diſſolved, from which he argued that the lords were not to conclude that by ſanctioning the ſentence produced, they either authorized adultery or gave effect to ſecond marriages while firſt marriages ſubſiſted; for at any time ſuch marriage might be eſtabliſhed, notwithſtanding a ſentence againſt it, when any perſon ſhould think fit in a legal way, in ſuch judicatures, to impeach that ſentence: but what he contended for was this, "that while the ſentence remains, the matter is concluded; the marriage can not be proved to exiſt; the relation of huſband and wife is deſtroyed."

Now, if this is well founded in the known practice and law of theſe courts, the conſequence will be, that this ſentence muſt now have the effect under a proſecution on the act of parliament, as it would have had in a proſecution in the eccleſiaſtical court for an adultery or a crime againſt the firſt marriage.

The caſes cited he conſidered as proving his concluſions; ſo did the rules of the courts of common law. In every inſtance in which an iſſue is joined in thoſe courts upon matrimony, they decide not: they ſend to the ſpiritual courts to have the matter decided upon. So in caſes of dower, where it is denied that the widow was lawfully married, the temporal courts refer the queſtion to the ſpiritual, and the deciſion of the biſhop is final. So on queſtions of legitimacy where baſtardy is alledged. So on the probate of wills, and even on an indictment of forgery, a deciſion of the eccleſiaſtical court on the validity of the will was held concluſive. The deciſions of the court of *admiralty* are likewiſe concluſive; and thoſe of the court of *exchequer*, concerning the revenue; and there are many other inſtances in which, after ſentences

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of courts having competent juriſdiction, all other courts are ſhut out from inquiry into the matter, however it might appear that ſuch ſentences are not founded in truth.

It may be ſaid in anſwer to theſe arguments, let ſuch ſentences be final and concluſive as they may, yet if a ſentence be the effect of agreement and colluſion, it ſhall not be final, nor have a binding force: but if there be any ground to impute to this ſentence ſuch original as the courts of common law call coven, or colluſion, this is not the place in which ſuch colluſion ought to be inquired into. Thoſe courts which have the deciſion of matters relating to marriage are fully equal to the deciſion of ſuch colluſion, they may undo their own ſentences; and it is not to be preſumed that they would encourage colluſion, and they will on any occaſion review their ſentences when applied to by perſons intereſted.

He then argued that the marriage in queſtion was not ſuch as the ſtatute of *James* made an object of puniſhment. The preamble recited that the ſtatute was made on account of temporal miſchiefs; and though ſuch offence was charged to be againſt God and religion, yet if that had been the only evil apprehended from ſuch marriages, the legiſlature would have left them to have been puniſhed where all other offences againſt religion are cognizable and puniſhable. It was the temporal miſchief that produced the law; but no temporal miſchief could ariſe from giving to the ſentence ſufficient weight to ſtop the proſecution; for that ſentence could not injure any human creature who did not chuſe to acquieſce under it; for the remoteſt iſſue might commence a ſuit in the ſpiritual court, in order to get rid of it. Give it therefore its utmoſt force in favour of the defendant, it would only go to prevent a proſecution where the marriage undone was of ſuch a ſort that no human creature would have an intereſt to ſupport it.

He then cited caſes to ſhew that colluſion was not the ſubject of temporal inquiry; but that ſuch inquiry ought to be confined to the ſpiritual courts. *Kenn's caſe*, 7. *Rep.* 41. *Morris and Webber. Moore* 225. *Hatfield* v. *Hatfield.*

His

His next object was to ſhew, from legiſlative authority, that a colluſive judgment in the ſpiritual court could not be ſet aſide, but is final and concluſive. For this purpoſe he cited *ſtat.* 9 *Hen.* 6. *ca.* 11. intitled "Proclamations "before a writ be awarded to a biſhop to certify baſ-"tardy," by the preamble of which it appears that a certificate of baſtardy, though obtained by flagrant coven and colluſion, is ſaid to have ſuch effect that it ought, by the law of England, diſinherit heirs and their iſſue for ever: and then it provides that "to eſchew ſuch ſubtle "diſinheriſons it is ordained, that in caſe of a certificate "of *mulier*, no manner of certificate ſhall be in anywiſe "put to prejudice, bind, endamage, or conclude any "perſon but him or his heirs that was a party to the "plea." And then it goes on to *enact*, that in future all proceedings of this ſort ſhall be attended with different proclamations that are ordered by that act, that it may in future be known when ſuch certificate will be applied for to the ſpiritual courts, and that all parties intereſted may have notice to make their objections.—Then does it not appear by this law, that the certificate or deciſion of the eccleſiaſtical court, in a caſe of baſtardy, even though founded upon colluſion, was deciſive, when once it was formally received from the eccleſiaſtical judge? And if it was ſo, will it be a ſtretch of the authority of that judicature, now to ſay, that a ſentence in a cauſe of marriage, which is as peculiarly to be confined to their juriſdiction, ought to have the ſame force! And if it is not to have the ſame force, will it not be breaking in upon or evading that juriſdiction in a way never before done, if the Houſe of Lords ſhould now ſuffer this ſentence in another place to be impeached and overturned.

He then ſtated the KING *v.* FAR, where the deciſion of the ſpiritual court upon a will is held to be deciſive upon the cleareſt proof of forgery. *Kelyng* 43. 1 *Siderf.* 254.

To preſume that the parties knew they were married, and that that conſideration brought the defendant within the ſtatute of *James*, would, he ſaid, be an impeachment of the ſentence; but another reaſon ſhewed ſhe

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was not within the act: the act did not mean, in all caſes to puniſh a ſecond marriage, where the former huſband or wife were found to be living, as where one of the parties is beyond the ſeas for ſeven years, with the knowledge of the other party; and as to the immorality of the caſe, as to the effect againſt religion and againſt the eternal ſacred obligation of marriage, it remains exactly the ſame, whether the huſband be on this ſide of the channel or the other. He then reviewed the ſeveral points he had made and concluded—"that upon the authorities "of law there was no ground to attach or impeach the "ſentence; that it was final and concluſive, of courſe "no other evidence ought to be received impeaching "the marriage; that the indictment therefore muſt fall, "and that as no evidence could be received, it would be "idle, impertinent, and of no uſe to ſtate it.

Doctor Calvert, ſame ſide, agreed that when judgment is given by any court having original and direct judication, though that may incidentally come before another court, that other court can not go into that queſtion which has by a competent juriſdiction been before determined. From this he agreed, that as eccleſiaſtical courts alone can determine an original queſtion of marriage, no other court can examine their ſentence; and cited *Kenn*'s caſe, and the caſe of *Corbet*. *Coke* 48. *Ante* 439.

He urged, that perſons not parties, but intereſted in the ſentence of jactitation might interfere or appeal within a proper time, and that the party againſt whom the ſentence was obtained might appear afterwards and produce proof, and be heard upon it; the reaſon of which indulgence was, that by the canon law a marriage was held to be indiſſoluble, and therefore a ſentence againſt it could never be final. If therefore any body appears who apprehends himſelf injured in the deciſion, and has an intereſt to ſhew that the judgment was not duly obtained, he may be heard; but while ſuch a judgment remains unimpeached, it is concluſive. The authorities ſhewed that when a ſentence determining on the point of jactitation of marriage has been offered in any court coming in incidentally, it has been conſtantly received,

received, but with this reſtriction, it muſt be where the marriage has been directly in iſſue; for if it be an incidental point only, it would not then be ſatisfactory. He cited *Blackman*'s caſe in point.

He contended that the preſent caſe was within the principle above laid down, the ſentence under conſideration being a direct determination on a marriage, and therefore not liable to the objection he had ſtated; and that being a direct determination, it was concluſive in a court of common law, as fully appeared by the caſes cited. While a ſentence of this kind exiſted, a wife could not be heard to have any claim on her huſband; ſhe could not claim the reſtitution of conjugal rights; there was no light in which ſhe could be underſtood to be the wife, until the marriage was again brought into queſtion. He cited *Milleſent* v. *Milleſent*, and *Mays* v. *Brown*, in the *Prerogative Court*, 1771.

The queſtion for the determination of the lords would be on the martiage ſaid to be had with Mr. *Hervey*; but it was clear that any determination that might affect that right, might affect not only the perſons immediately parties to that ſuit, but the many connections, relationſhips, and new claims that ariſe upon marriage might be precluded by ſuch a ſentence. Suppoſe the duke of *Kingſton* had iſſue by his marriage, it would be as much their intereſt to eſtabliſh this ſentence, as it would be the intereſt of any other to impeach it; and that ſuch rights as theſe ſhould be determined in a criminal juriſdiction where the parties can not be heard, is a poſition that never was yet maintained. *Rex* v. *Vincent*. 1 *Stra*. 481. *Ante* . The *King* v. *Rhodes*. 1 *Stra*. 703. cited by Mr. *Wallace*, as the *King* v. *Roberts*. *Ante* .

So in the KING v. PERRY. The above caſes were recognized at the *Old-Bailey*. The judge offered to put off the trial, if the priſoner had a mind to plead the ſentence of the eccleſiaſtical court, which he refuſed. But this caſe does not impeach the former determinations; becauſe if the probate was not inſiſted on by the defendant, conſequently not over-ruled by the court, theſe caſes remain in full force, and prove the principle contended for, that in a criminal court caſes of this ſort ought not to be gone into.

Will it be ſaid that this being a proſecution under a ſpecial act of parliament, the crime conſiſts in having married two perſons, that the marriage muſt neceſſarily come under the conſideration of that court which is to determine the crime? and they can not by the act of parliament itſelf acquire an original juriſdiction to inquire into the right of marriage? Does it not apply exactly as ſtrong to the caſe of forging a will, for it is by expreſs act of parliament made death to forge a will; and it may as well be argued from hence that every criminal court has by that act acquired an original juriſdiction as to wills. It can not be argued that a criminal court has juriſdiction of marriage; the court muſt neceſſarily inquire into facts, but it can not originally entertain ſuch a queſtion; and therefore it can not have an original juriſdiction upon the fraud and colluſion. If any court is ever permitted to inquire into the queſtion, it muſt be a court having concurrent juriſdiction, and then the queſtion will be ſeen on a different ground, becauſe a court having concurrent juriſdiction has alſo the opportunities, and all the methods of inquiring into the original queſtion. They being competent to determine the original point, it makes no conſiderable difference whether it comes before them firſt or whether it has before been determined by another court. A criminal court has no concurrent juriſdiction with the eccleſiaſtical court; it can never entertain the abſtract queſtion, whether parties are man and wife; the only way that queſtion can be taken up is incidentally; and the authorities ſhew, that where an incidental queſtion ariſes, if it has been determined by a court having original juriſdiction, it ought to be concluſive, and that rule applies to the caſe now before the lords. For thoſe and the other reaſons given, the Houſe of Lords will not recede from eſtabliſhed and legal principles, or make a precedent; but if there is good ground in law to ſay that this ſentence ought to be concluſive to the point to which it is offered, the proſecutor will not be permitted to go into evidence.

Doctor *Wynne*, ſame ſide, having ſtated the caſe, ſubmitted among other reaſons that the marriage was the only

only fact that can make any criminality in the caſe; and if that fact has been already decided on, and that deciſion is ſtill in force, the proſecutors are barred from going into evidence upon it. He argued from all the caſes and poſitions before cited, and urged the great confuſion that muſt ariſe, if the ſentences of courts were not allowed to take effect, but that the matter might be examined over again, and a ſubſequent ſentence be given in another court contrary to the ſentence firſt given by the original juriſdiction, the former ſentence remaining unrepealed. This he illuſtrated by inſtances to prove the inconvenience and abſurdity of ſuch practice in civil caſes; and then argued that in criminal caſes the ſame rules ſhould bind as in thoſe of a civil nature, as the evil effects in ſuch caſes would be ſtill greater. It could not, he ſaid, be held in any caſe, or in any country that a ſentence which would be held to be concluſive evidence to avoid a civil demand, would not be held to be concluſive evidence and defence againſt a criminal proſecution. *In penalibus cauſis benignius interpretandum eſt*, is a maxim of univerſal law.

To ſhew the extraordinary and unuſual ſteps which have been ſometimes taken by courts in caſes ſimilar to the preſent to avoid a contrariety of ſentences of courts having different and diſtinct juriſdictions, he cited two caſes—

Boyle *v.* Boyle, *B. R.* 1687. The ſpiritual court againſt a woman, *cauſa jactitationis maritagii*. The woman prayed a prohibition to the eccleſiaſtical court, and the ſuggeſtion was, that this perſon, who now libelled againſt her in a cauſe of jactitation, had been indicted at the ſeſſions in the *Old-Bailey* for marrying her, he having a wife then living; that he was thereupon convicted, and had judgment to be burnt in the hand, and therefore they had no right to proceed, and a prohibition was prayed. Serjeant *Levintz* in that caſe moved for a conſultation, becauſe no court but the eccleſiaſtical court can examine the marriage. Upon the contrary, it was ſaid that if a prohibition would not go, then the authority of theſe two courts would interfere, which might be a thing of ill conſequence: that if the lawful-

neſs of this marriage had been firſt tried in the court chriſtian, the other court at the *Old-Bailey* would have given credit to their ſentence, and upon this ground and this principle merely, that there might be a contrariety of ſentences which would be miſchievous. The court certainly went a great way, for it prohibited the eccleſiaſtical court from proceeding in a marriage cauſe *inter vivos*, of which it has the cleareſt and moſt uncontroverted juriſdiction. 3 *Mod.* 164.

FURSMAN *v.* FURSMAN. This cauſe began in the conſiſtory court of *Exeter*. It was a cauſe of reſtitution of conjugal rights brought by the woman. The libel was admitted; and then there was an appeal to the court of *Arches*. The judge pronounced for the appeal, and was proceeding upon the merits of the cauſe; but upon the fourth of November, 1727, he was ſerved with a prohibition. The ground for obtaining the prohibition was, that *Sarah Furſman* pretending to be the lawful wife of the ſaid *Furſman* had indicted him for bigamy in marrying another wife, and failed in proof of her own marriage; whereupon the ſaid *Furſman* was acquitted, and therefore it was the ſaid eccleſiaſtical court ſhould not proceed.

Now if a prior judgment in a matter in which a court can have only an incidental partial juriſdiction is a ſufficient cauſe for ſtopping all ſubſequent proceedings in the ſame caſe, even in the court which has the entire ordinary juriſdiction over the queſtion, on account of the ill conſequence that would enſue from the interference of the authority of the two courts, ſurely by parity of reaſoning, in a caſe where it appears that the court, which the law and conſtitution have entruſted with the entire juriſdiction over the matter in queſtion, has already taken cognizance of it and pronounced its ſentence, the court of incidental juriſdiction will give credit to ſuch ſentence, and conform its own ſentence to it. Surely this court will not, by bill of indictment ſet the ſentence of the eccleſiaſtical court entirely at nought, and brand an open and ſolemn marriage, conſummated by a cohabitation and reputation of years with the name of a felony. A court of juſtice will not hazard ſuch

confuſion

confuſion and ſcandal upon any ſuggeſtion or apprehenſion of error in the former ſentence, or fraud in obtaining it, but will leave it to be examined by the eccleſiaſtical court, which only had juriſdiction to examine. In ſupport of this he quoted *Sanchez de Matrimonio. lib.* 7. *diſp.* 100. *ca.* 1.

Mr. *Attorney General* (THURLOW) now lord THURLOW, for the crown. The point is new, and no *principle* has been ſtated to ſupport it. The priſoner being arraigned and indicted for felony, has pleaded not guilty, and iſſue is joined. In this ſtate of the buſineſs, ſhe moves that no evidence ſhall be given or ſtated to prove that guilt upon her which ſhe hath denied and put in iſſue. *Jones v. Bow* is the only caſe cited to ſupport the motion, but it bears no relation or proportion to the preſent caſe. In the trial of an ejectment, the defendant admitting the plaintiffs title to be otherwiſe clear, avoided it by a ſentence againſt the pretended matrimony of his mother with Sir *Robert Carr*; after which both parties married with other perſons; a ſentence unimpeached in form or ſubſtance againſt his own mother, from whom he was to derive title to his ſtate; deciſive, conſequently, as a fine with non-claim or any other perfect bar; and ſubmitted to accordingly, for the plaintiff was called and did not appear. *Carth.* 225.

Here, if the ſentence ſhould ever come properly under examination, it will appear to differ in all thoſe reſpects.

If this ſentence be, as argued, a definitive and preclusive objection to all inquiry, it ought to have been pleaded in bar; or it may be relied on in evidence of not guilty: but it can not ſtop the trial.

This being unprecedented, goes a great way to conclude againſt it. To ſay that ſuch a rule would be inconſiſtent with the plea, and repugnant to the record as it now ſtands, ſeems deciſive. After putting herſelf for trial upon God and her peers, ſhe beſeeches you not to hear her tried.

Upon the general ground of the debate he obſerved, that every ſpecies and colour of the guilt was admitted; ſo that the court would take the crime to be proved, with every

every baſe and hateful aggravation it might admit; the firſt marriage ſolemnly celebrated, perfectly conſummated; the ſecond wickedly brought about, by practiſing a concerted fraud upon a court of juſtice to obtain a colluſive ſentence againſt the firſt, a circumſtance of great aggravation. When *Farr* and *Chadwick* defended a burglarious breaking and entering, under a pretence of an execution, upon a judgement fraudulently obtained againſt the caſual ejector, it was thought to aggravate their crime, and they ſuffered accordingly. *Old-Bailey ſeſſions, April*, 1665. *Kelynge*, 43. 1 *Siderf.* 254. *S. C. Raym.* 276. *Foſt.* 77.

The ſentence being colluſive is a nullity: if fair, it could not be admitted againſt the king who was no party to the ſuit. If admitted, it could not conclude in this ſort of ſuit, which puts both marriages in iſſue. The objections ariſe from the general nature of the ſentence propounded, which is never final; from the parties who could not by their act bind any but themſelves, or thoſe who are repreſented by them, or at moſt, thoſe who might have intervened in the ſuit; from the nature of the preſent indictment, which puts the marriage directly in iſſue, from the circumſtances peculiar to this ſentence, which prove it to be colluſive.

Without adverting much to thoſe particulars, the counſel for the priſoner affected to lay down an univerſal propoſition; that all ſentences of peculiar juriſdictions are not only admiſſible but concluſive evidence, and referred to many caſes not applicable.

Burrows v. *Jamineau* is nothing to this purpoſe. The plaintiff inſiſted upon recovering, becauſe if the acceptance (made in *Leghorn*), had been made here, it would have bound; but according to the law of that place where it was made, the acceptance did not conſtitute a contract. The plaintiff might, if he had been adviſed otherwiſe, have defended that ſuit; he acquieſced in the deciſion. 2 *Stra.* 733. *Ante*

Courts of *admiralty* ſit between nation and nation. They proceed in *rem*, but they bind the property not only againſt the apparent poſſeſſor, but all the world, or elſe the very exiſtence of the court would be ſubverted. Therefore

Therefore in *Hughes* v. *Cornelius* the plaintiff failed in his action of trover, although the verdict found his property, and conſequently the ſentence of the *French* admiralty erroneous; becauſe the court had no juriſdiction over that ſentence. The ſame reaſon applies to *Green* and *Waller*. There is no appeal but to the ſword. Vide *Ante* .

The ſame principle governs as to ſeizures in the *Exchequer*, where any perſon may come in and claim; which, if they neglect, they tacitly aſſent to the condemnation. So of ſeizures freed before the commiſſioners of aſſize. Vide *Ante* .

He then anſwered the ſeveral other caſes by pointing out their irrelevancy to that before the court. Inſiſted that ſentences which are given by the biſhop, or his official, by his own mere authority, had no pretence to bind or influence any queſtion which may ariſe after in judicature: for ſuch cauſes puniſh no crime, try no right, proceed to no civil effect, but only *pro ſalute animæ rei* to reform ſome enormity or neglect in religious life: and ſhewed from the *decretals* that ſuch ſentence can not be final. In all civil cauſes, he obſerved, the maxim is univerſal, *expedit reipublicæ ut fines aliquis ſit litium.* In prodeedings *pro ſalute animæ*, the reaſon of the thing is on the other ſide.

The acknowledged futility of ſuch ſentences and the arguments drawn from them not being final to ſhew that they were concluſive upon the court, he treated with ridicule: the argument he ſaid was this—all the world ſhall be bound by that judgment, which the court who pronounced it hold for no judgment, and will ſuffer to bind nobody. But ſuch was the neceſſity of the argument, to give it any effect they were forced to aſſume, that this ſort of ſentence is the judgment of a civil judicature on a civil ſubject, which is not true; and to give it effect againſt others than parties, they were forced to admit that ſuch others may ſet it aſide, which is true, only becauſe it is no ſuch judgment.

He then obſerved upon the ſeveral caſes ſtated on the other ſide. On that of the *King* v. *Vincent* he obſerved, the citing of it was an attempt to ſhew that the authority

of

of the eccleſiaſtical court had been interpoſed between public juſtice and the crime of forgery; but in that caſe the ſupport of the will was not in queſtion. It was produced in common form, which is not binding even in the ſpiritual court. 1 *Roll. Rep.* 21.

In that caſe of *Vincent* the queſtion was not whether the ſentence ſhould have credit in reſpect to the underſtanding which the ſpiritual judges have in the rules and courſe of their own law, but whether a probate granted of courſe, on the oath of the very party charged with the forgery, ſhall be a full and concluſive bar to the proſecution. This is too monſtrous to be left upon the authority of a ſhort and ſingle caſe, without condeſcending to explain what conſiſtency it holds with public juſtice, what reſpect to common ſenſe, will allow the crime of forgery or perjury to be defended by the allegation of that very fraud which the indictment meant to puniſh; not ſtating any trial or judgment upon it, but merely that it had been practiced. If the pretended executor had repelled the objection of forgery, even in that court, it would have borne ſome countenance at leaſt, but the fraud paſſed without examination where in the nature of the proceedings none could be had.

The *King* v. *Rhodes* proves nothing, for it was merely a queſtion of direction, whether the court would proceed to try the forgery of an inſtrument, while the property to be affected by it remained *ſub judice*. 1 *Stra.* 703. *Ante*

This is a matter of great conſequence to public juſtice; at the ſame time it is the ſort of caſe which muſt happen frequently. The fraud was frequently practiſed in the late war upon ſailors; and if this rule had exiſted, could never have been puniſhed. He then quoted *Stirling*'s caſe in contradiction to thoſe cited; and concluded his argument on thoſe criminal caſes by obſerving he could not bring himſelf to imagine it would be entertained as a ſerious opinion, that the mere perpetration of a crime may be pleaded in bar to a proſecution for it. This is certainly not for the intereſt of juſtice, nor for the honour of the ſpiritual court, becauſe it would take away

from

from that juriſdiction one guard againſt falſhood and fraud of which every other is poſſeſſed.

Whatever may be ſaid in the inſtance of forgery, perjury, and other frauds upon the ſpiritual court, where the criminal court may ſeem to impeach their ſentences, without aſſuming any juriſdiction in the matter of them; in this caſe it is impoſſible to alledge, that the criminal court is not fully competent to decide upon the whole matter of the indictment, particularly on both the marriages there ſtated as conſtituting the crime.

It had been laid down, that this crime was formerly puniſhed by the canon law, and in the eccleſiaſtical court; and that transferring the puniſhment of it from the eccleſiaſtical to the temporal juriſdiction ſhould not prejudice any defences which the party might have ſet up in the firſt court. In order to make that obſervation bear, ſome proof ſhould have been added, that this ſentence would have barred ſuch a ſuit however promoted, *exceptione rei judicatæ*. Then ſuppoſing this juriſdiction no better than concurrent, this court might have been barred, *pari ratione*. But it is already eſtabliſhed from eccleſiaſtical authorities that no ſuch exception would lie in that law, and the ſame thing is no leſs true in our law where the court can by any means take conuſance of the right of marriage. As in Dower, *Robins* v. *Crutchley*, 2 *Wilſ.* 118, 127.

Nay the very ſtatute on which the indictment is framed proves the ſame thing. It excepts the caſes where the former marriage is diſſolved, or declared void by ſentence, or was contracted under the age of conſent; all which, otherwiſe, would have been liable under an indictment for felony. *Stat.* 1 *Jac.* 1. *ca.* 11. *Iriſh Stat.* 10 *Car.* 1. *ca.* 21. 2 *Stat. at large*, 82. *ſec.* 1.

He then anſwered ſeveral of the other caſes cited on part of the defendant, and obſerved upon them that more perverſe inferences were never extorted from any caſes than from theſe. A court of *Oyer and Terminer* is to determine without hearing, for this ſpecial reaſon, that it will be final. A court of direct, complete, and excluſive juriſdiction, is to be bound and governed by one

of no juriſdiction, either direct or indirect, on the matter. A court which decides once for ever, is to be bound by one which never decides. The ſentence remains open for further examination; let it therefore be adopted without examination, in order that it may never be examined.

He conſidered all he had ſaid unneceſſary, for there was no ſentence to combat with; what was called a ſentence was admitted to be, and ſo the court muſt take it, colluſive and fraudulent in every view; and the defendant's counſel have contended that ſuch a colluſive ſentence ſhall bind the court. To prove ſuch ſentence a nullity as to thoſe who were not parties to it, he cited 44 *Edw.* 3. 45. *b.* 3 *Co.* 78. *Dier.* 339, applicable to the eccleſiaſtical court. *Gawen* v. *Roche*, 1 *Veſey*, 157. *Gloſs.* 14. *Queſt.* 12. *Lloyd* v. *Maddox*. *Moor*, 917.

He then examined the arguments on this point uſed on the other ſide, and concluded with ſaying: The motion is not admiſſible. It is inconſiſtent with all order and method of trial to debate imaginary topics of defence before hearing the charge, and for the court to reſolve abſtract queſtions upon hypothetical grounds.

The *Solicitor General* argued on the ſame ſide, and to ſhew that ſuch ſentence was no bar to an indictment, he cited,

The KING *v.* RICHARDSON and CARR, *Old-Bailey September ſeſſions*, 1765. The defendants were indicted for having forged a receipt for the payment of money with intent to defraud *A. B.* a ſeaman, intitled to wages. Upon the trial it appeared that the receipt was given in the name of *Jane Steward*, who was the ſuppoſed executrix of the will of *A. B.* which had been proved by the defendant *Carr* upon the oath of the other defendant *Richardſon*. Baron PERROT, who tried the priſoner, was of opinion that the priſoners ought to be acquitted of the charge of forging a receipt for the money; but being ſatisfied from the evidence that *Richardſon* had forged the will, notwithſtanding it appeared in the trial before him that a probate had been granted to that will, he remanded *Richardſon* to gaol to take his trial for the forgery of the will. *Richardſon* was accordingly tried in *October ſeſſions*,

ſeſſions, 1765, for forging the will of *John Steward*, a mariner. The officer of the prerogative court proved upon that trial, that the will was brought to his office by *Richardſon*, and a probate of that will granted, and upon that proof he was convicted and executed.

This and the caſe of *Sterling* refute that of the *King* v. *Vincent*. The only authority to ſupport the argument that the ſentence of an eccleſiaſtical court is a bar to an indictment. *Ante* .

Mr. *Dunning*, to the ſame point, ſaid it would be impertinent to be labouring to prove that when a ſubject is examined into, in the courſe of a criminal inquiry, under the form of an indictment or of an information, what has paſſed or may paſs in the courſe of a civil inquiry on the ſame ſubject and the ſame queſtion is not regarded, but is not admitted. In the inſtance that was put and in many others it is perfectly notorious, and therefore neither requires argument nor proof that the practice is certainly ſo. Let a man be acquitted in a court of criminal juriſdiction it does not preclude a party, complaining of an injury ariſing from that act, which in a criminal court has been preſented as a crime from ſeeking redreſs for the civil injury; and *vice verſa*, the fate of ſuch an action can not be inquired into, much leſs can it preclude the proceedings in a ſubſequent criminal inquiry taking its riſe from the ſame act. It has been inquired into in a court of one deſcription, it is now inquiring into in a court of another deſcription.

One reaſon, and there are many others, why courts of criminal juriſdiction do not admit any account of what has paſſed upon the agitation of the queſtion in a court of civil juriſdiction, may be the liability to fraud and colluſion; for it is obvious that if this would do, if the ſentence of a court of ſuch juriſdiction, whether eccleſiaſtical or temporal, will conclude a criminal inquiry, the receipt is of ample uſe, and all men may, if they pleaſe, cover themſelves againſt the penal conſequences of their crimes by inſtituting a friendly ſuit. Some ſuch we have known to be ſo conducted as to eſcape the attention of the judges, who have not found out until after the cauſe

has been decided that the cauſe has been colluſive. Caſes of this ſort are ſo open to fraud and colluſion, that for this reaſon if there were no other, the courts of criminal juriſdiction will always reject ſuch evidence. He denied the *King* v. *Vincent* to be law; the ſuppoſition that it was ſo, if it ever exiſted, was removed by the different opinions held, upon the ſame point, by the judges who have ſucceeded in the ſame court, and to whoſe knowledge or ability no man could object. The *King* v. *Sterling*, he was aware might be attempted to be diſtinguiſhed, by ſaying that the queſtion did dot occur, the objection was not taken in this or the other caſe, but knowing before whom thoſe criminals were tried, no ſuch objection could have eſcaped the judges, if it had been founded in law, although no counſel objected to it, or although the criminals perhaps had not the aſſiſtance of counſel; therefore that caſe may be conſidered fairly diſmiſſed, and the ſubſequent caſes carrying an authority againſt the defendant more than overturn it. But the *King* v. *Vincent* has no reſemblance to the ſentence now offered; it was an official inſtrument neceſſary to give ſanction to a legal trial. Letters of adminiſtration or a probate may be admiſſible, but it does not follow that a ſentence like this is admiſſible in this court: if it be, it muſt be equally admiſſible on all ſides. It is argued that this court ſhould receive it, ſhould act upon it, ſhould conclude upon it. Why? Becauſe it is a ſentence reſcinding the marriage, declaring that there was no marriage, that is the import of this ſentence; and therefore it operates in the defendant's favour, and therefore it happens that her counſel produced it. Let the caſe be inverted; let it be ſuppoſed that when this lady inſtituted that ſuit, the party who was the object of it, had ſupported that defence, as he was very well able to have done, and that in conſequence the cauſe had ended in a declaration or a ſentence that there was a marriage, in that caſe would it have been evidence on the part of the proſecutor? Would it have been attended with thoſe conſequences which are claiming for it now on the part of the perſon proſecuted? Would the Houſe of Lords have endured that the proſecutor would

have

have come here, to ſupport this indictment by no other evidence than the production of a ſentence in a ſuit like this in the ſpiritual court, by which that court had determined Mr. *Henſey* and the lady he had married were huſband and wife? Every mind muſt revolt at the hardſhip and injuſtice of ſuch an idea! And yet is there any thing more true than that a record cannot be evidence of one ſide, which if not, if it had imported the reverſe, have been evidence and with equal force with the other? It was one of the fundamental rules to determine what evidence of this nature is or is not admiſſible, that if it could not have been admitted on behalf of the party objecting to it, ſuppoſing its import had been favourable to him, ſo neither ſhall it be admitted on behalf of the perſon propoſing it. In order to ſupport this indictment, ſomething more than ſuch a ſentence will be required from the proſecutor; and it is clear that the legiſlature in making this new proviſion meant that the fact ſhould be inquired into, as all other facts are inquired into; that the relation ſhould be proved by thoſe who were witneſſes to it, by thoſe who can prove the confeſſion of the parties to it, or by thoſe who can give ſuch other evidence as courts of criminal juriſdiction are authoriſed to act upon. Can any thing then be more obviouſly unſuitable to juſtice than that the inquiry ſhould be precluded by a record in favour of one of the parties, which might have been as favourable to the other party, and which if it had been would not have been regarded. He then anſwered the ſeveral other points previouſly agitated in the caſe.

Doctor *Harris* ſpoke, and ably on the ſame ſide.

Mr. *Wallis* replied to all the objections, and was followed by Doctor *Calvert*.

It was then ordered by the court that the following queſtions be put to the judges, *viz.*

Firſt, Whether a ſentence of the ſpiritual court againſt a marriage in a ſuit of jactitation of marriage is concluſive evidence ſo as to ſtop the counſel for the crown from proving the ſame marriage in an indictment for polygamy?

Second,

Second, Whether admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion.

The CHIEF JUSTICES of the COMMON PLEAS delivered the unanimous opinion of the judges with their reaſons, and ſome obſervations on what paſſed in argument.

What has been ſaid at the bar is certainly true, as a general principle, that a tranſaction between two parties in judicial proceedings, ought not to be binding upon a third; for it would be unjuſt to bind any perſon who could not be admitted to make a defence, or to examine witneſſes, or to appeal to a judgment he might think erroneous, and therefore the depoſition of witneſſes in another cauſe, in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the fact found, although evidence againſt the parties, and all claiming under them, are not in general to be uſed to the prejudice of ſtrangers. There are ſome exceptions to this general rule.

From the variety of caſes relative to judgments being given in evidence in civil ſuits, theſe two deductions ſeem to follow, as generally true: *Firſt*, that the judgment of a court of concurrent juriſdiction directly upon the point, is, as a plea, a bar, or as evidence concluſive between the ſame parties, upon the ſame matter directly in queſtion in another court. *Secondly*, that the judgment of a court of excluſive juriſdiction directly upon the point, is, in the like manner, concluſive upon the ſame matter, between the ſame parties, coming incidentally in queſtion in another court. But neither the judgment of a concurrent or excluſive juriſdiction is evidence of any matter which came collaterally in queſtion, though within their juriſdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument by the judgment.

Upon the ſubject of marriage, the ſpiritual court has the ſole and excluſive cognizance of queſtioning and deciding, directly, the queſtion of marriage; and of enforcing ſpecifically the rights and obligations reſpecting perſons

perſons depending upon it; but the temporal courts have the ſole cognizance of examining and deciding upon all temporal rights of property; and ſo far as ſuch rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the deciſion of the proper objects of their juriſdiction: they do not want or require the aid of the ſpiritual courts, nor has the law provided any legal means of ſending to them for their opinion, except where, in the caſe of marriage, an iſſue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate conſequence, "general baſtardy;" or in like manner in ſome other particular inſtances, lying peculiarly in the knowledge of their courts, as profeſſion, deprivation, and ſome others: in theſe caſes, upon the iſſue ſo formed, the mode of trying the queſtion is by reference to the ordinary; and his certificate when returned, received, and entered upon the record, in the temporal courts, is a perpetual and concluſive evidence againſt all the world upon that point, which exceptionable extent on whatever reaſons founded, was the occaſion of the ſtatute of the 9 *Hen.* 6. requiring certain public proclamations to be made for perſons intereſted to come in and be parties to the proceeding. But even in theſe caſes, if the ordinary ſhould return no certificate, or an inſufficient one; or if the iſſue is accompanied with any ſpecial circumſtances, as if a ſpecial iſſue, triable by a jury, is formed upon the ſame record; or if the effect of the ſame iſſue is put in another form, a jury is to decide, and not the ordinary to certify the truth; and to this purpoſe ſir *William Staunford* mentions a remarkable inſtance. Bigamy was triable by the biſhop's certificate; but if the priſoner, to avoid the charge, pleads that the ſecond eſpouſals were null and void, becauſe he had a former wife living, this ſpecial bigamy was not to be tried by the biſhop's certificate.

So that the trial of marriage, either as to legality or fact, was not abſolutely and from its nature an object *alieni fori*.

There

There was a time when the ſpiritual courts wiſhed that their determinations might, in all caſes, be received as authentic in the temporal courts, and in that ſolemn aſſembly of the king, the peers, the biſhops, and judges, convened for the purpoſe of ſettling the demands of the church, by *Edward* the ſecond, one of the claims was expreſſed in theſe words: " *Si aliqua cauſa, vel negotium,* " *cujus cognitio ſpectat ad forum eccleſiaſticum, et coram ec-* " *cleſiaſtico judice fuerit ſententialiter terminatum, et tran-* " *ſierit in rem judicatam, nec per appellationem fuerit ſuſ-* " *penſum; et poſt modum, coram judice ſeculari ſuper eadem* " *re inter eaſdem, perſonas queſtio moveatur et provetur per* " *teſtes vel inſtrumenta, talis exceptio in foro ſeculari non* " *admittatur.*" The anſwer to which demand was expreſſed in this manner: " *Quando eadem cauſa diverſis* " *rationibus coram judicibus eccleſiaſticis, et ſecularibus, ven-* " *tilatur, dicunt quod (non obſtante eccleſiaſtico judicio) curia* " *regis ipſum tractet negotium, ut ſibi expedire videtur.*" For which lord *Coke* gives this reaſon, " For the ſpiri- " tual judges proceedings are for the correction of the " ſpiritual inward man, and *pro ſalutæ animæ*, to enjoin " him penance; and the judges of the common law " proceed to give damages and recompence for the " wrong and injury done," and then adds, " and ſo " this article was deſervedly rejected." 2 *Inſt.* 22.

And the ſame demand was made, and received the ſame anſwer, in the third year of king *James* the firſt.

It is to be obſerved, that this demand related only to civil ſuits between the ſame parties; and that the ſentence ſhould be received as a plea in bar. But this attempt and miſcarriage did not prevent the temporal courts from ſhewing the ſame reſpect to their proceedings as they did to thoſe of other courts. And therefore, where in civil cauſes they found the queſtion of marriage directly determined by the eccleſiaſtical courts, they received the ſentence, though not as a plea, yet as a proof of the fact, it being an authority accredited in a judicial proceeding by a court of competent juriſdiction; but ſtill they received it upon the ſame principles, and ſubject to the ſame rules by which they admit the acts of other courts.

Hence

Hence a ſentence of nullity, and a ſentence of affirmance of marriage, have been received as concluſive evidence on a queſtion of legitimacy, ariſing incidentally upon a claim to a real eſtate.

A ſentence in a cauſe of jactitation has been received upon a title in ejectment, as evidence againſt a marriage, and in like manner in perſonal actions, immediately founded on a ſuppoſed marriage.

So a direct ſentence, in a ſuit upon a promiſe of marriage, againſt the contract, has been admitted as evidence againſt ſuch contract, in an action brought upon the ſame promiſe for damages, it being a direct ſentence of a competent court, diſproving the ground of the action.

So a ſentence of nullity is equally evidence in a perſonal action againſt a defence found upon a ſuppoſed coverture.

But in all theſe caſes the parties to the ſuits, or at leaſt the parties againſt whom the evidence was received, were parties to the ſentence, and had acquieſced under it; or claimed under thoſe who were parties, and had acquieſced.

But although the law ſtands thus with regard to *civil ſuits*, proceedings in matters of *crime*, and eſpecially of *felony*, fall under a different conſideration: *Firſt*, becauſe the parties are not the ſame; for the king, in whom the truſt of proſecuting public offences is veſted, and which is executed by his immediate orders, or in his name by ſome proſecutor, is no party to the proceedings in the eccleſiaſtical court, and cannot be admitted to defend, examine witneſſes in any manner, intervene or appeal: *Secondly*, ſuch doctrines would tend to give the ſpiritual courts, which are not permitted to exerciſe any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the deciſion from the common law, to which it ſolely and peculiarly belongs.

The ground of the judicial powers given to eccleſiaſtical courts, is merely of a ſpiritual conſideration, *pro correctione morum, et pro ſalute animæ*. They are therefore addreſſed to the conſcience of the party. But one great object of temporal juriſdiction is the public peace; and

crimes againſt the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was alſo ſo. A felony by ſtatute becomes ſo at the moment of its inſtitution. The temporal courts alone can expound the law, and judge of the crime, and its proofs; in doing ſo they muſt ſee with their own eyes, and try by their own rules, that is, by the common law of the land; and it is the truſt and ſworn duty of their office.

When the acts of *Henry* the eighth firſt declared what marriages ſhould be lawful, and what inceſtuous, the temporal courts, though they had before no juriſdiction, and the acts did not by expreſs words give them any upon the point, decided, incidentally, upon the conſtruction, declared what marriages came within the *Levitical* degrees, and prohibited the ſpiritual courts from giving or proceeding upon any other conſtruction.

Whilſt an antient ſtatute ſubſiſted, by which perſonal puniſhment was incurred on holding heretical doctrines, the temporal courts took notice incidentally, whether the tenet was heretical or not, for "the king's courts "will examine all things ordained by ſtatute." Vide *ſtat.* 2 *Hen.* 4. *ca.* 15.

When the ſtatute of *William* 3. made certain blaſphemous doctrines a temporal crime, the temporal courts alone could determine whether the doctrine complained of was blaſphemous, ſo as to conſtitute the crime.

If a man ſhould be indicted for taking a woman by force and marrying her; or for marrying a child without her father's conſent; or for a rape, where the defence is "that the woman is his wife;" in all theſe caſes the temporal courts are bound to try the priſoner by the rules and courſe of the common law, and incidentally to determine what is heretical, and what is blaſphemous; and whether it was a marriage within the ſtatute, a marriage without conſent; and whether, in the laſt caſe, the woman was his wife: but if they ſhould happen to find, that ſentences in the reſpective caſes, had been given in the ſpiritual court upon the hereſy, the blaſphemous doctrines, the marriage by force, the marriage without conſent, and the marriage on the rape;

rape; and the court muſt receive ſuch ſentences as concluſive evidence, in the firſt inſtance, without looking into the caſe, it would veſt the ſubſtantial and effective deciſion, though not the cognizance of the crimes in the ſpiritual court, and leave to the jury and the temporal courts, nothing but a nominal form of proceeding upon what would amount to a predetermined conviction or acquittal, which muſt have the effect of a real prohibition, ſince it would be in vain to prefer an indictment, where an act of a foreign court ſhall at once ſeal up the lips of the witneſſes, the jury, and the court, and put an entire ſtop to the proceedings.

And yet it is true, that the ſpiritual courts have no juriſdiction, directly or indirectly, in any matter not altogether ſpiritual; and it is equally true, that the temporal courts have the ſole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence muſt be, as it is often declared to be, reciprocal, and that in all caſes, in which ſentences favourable to the priſoner, are to be admitted as concluſive evidence for him; the ſentences, if unfavourable to the priſoner, are, in like manner, concluſive evidence againſt him; in what ſituation muſt the priſoners be, whoſe life, or liberty, or property, or fame, reſts on the judgments of courts, which have no juriſdiction over them in the predicament in which they ſtand? and in what ſituation are the judges of the common law, who muſt condemn, on the word of an eccleſiaſtical judge, without exerciſing any judgment of their own?

The ſpiritual court alone can deprive a clergyman. Felony is a good cauſe of deprivation. Yet in lord *Hobart*'s reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and, though after conviction they may act upon that, and make the conviction a ground of deprivation, neither ſide can prove or diſprove any thing againſt the verdict; becauſe, as that learned judge declares, "It "would be to determine, though not capitally, upon a "capital crime, and thereby judge of the nature of the "crime, and the validity of the proofs; neither of "which belong to them to do."

If therefore ſuch a ſentence, even upon a matter within their juriſdiction, and before a felony committed, ſhould be concluſive evidence, a trial for a felony committed after, the opinion of a judge incompetent to the purpoſe, reſulting (for aught appears) from incompetent proofs (as ſuppoſe the ſuppletory oath) will direct or rule a jury, and a court of competent juriſdiction, without confronting any witneſſes, or hearing any proofs: for the queſtion ſuppoſes and the truth is, that the temporal court does not, and cannot examine, whether the ſentence is a juſt concluſion from the caſe, either in law or fact; and the difficulty will not be removed by preſuming that every court determines rightly, becauſe it muſt be preſumed to, that the parties did right in bringing the full and true caſe before the court; and if they did, ſtill the court will have determined rightly by the eccleſiaſtical laws and rules, and not by thoſe laws and rules by which criminals are to ſtand or fall in this country.

If the reaſon for receiving ſuch ſentence is, becauſe it is the judgment of a court competent to the inquiry then before them; from the ſame reaſon, the determination of two juſtices of the peace upon the fact or validity of a marriage, in adjudging a place of ſettlement, may hereafter be offered as evidence, and give the law to the higheſt court of criminal juriſdiction.

But if a direct ſentence upon the identical queſtion, in a matrimonial cauſe, ſhould be admitted as evidence, (though ſuch ſentence againſt the marriage has not the force of a final deciſion, that there was none) yet a cauſe of jactitation is of a different nature; it is ranked as a cauſe of defamation only, and not as a matrimonial cauſe, unleſs where the defendant pleads a marriage; and whether it continues a matrimonial cauſe throughout, as ſome ſay, or ceaſes to be ſo on failure of proving a marriage, as others have ſaid, ſtill the ſentence has only a negative and qualified effect, *viz.* "that the party has "failed in his proof, and that the libellant is free from all "matrimonial contract, *as far as yet appears*;" leaving it open to new proofs of the ſame marriage in the ſame cauſe,

cauſe, or to any proofs of that or any other marriage in another cauſe: and if ſuch ſentence is no plea to a new ſuit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the ſentence, from going into new proofs to make out that or any other marriage.

So that admitting the ſentence in its full extent and import, it only proves that it did not yet appear that they were married; and not that they were not married at all: and by the rule laid down by lord chief juſtice *Holt*, ſuch ſentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time and place. That ſentence and this judgment may ſtand well together, and both propoſitions be equally true: it may be true that the ſpiritual court had not then ſufficient proof of the marriage ſpecified, and that your lordſhips may now, unfortunately find ſufficient proof of ſome marriage.

But if it was a direct and deciſive ſentence upon the point, and, as it ſtands, to be admitted as concluſive evidence upon the court, and not be impeached from within; yet like all other acts of the higheſt judicial authority, it is impeachable from without: although it is not permitted to ſhew that the court was *miſtaken*, it may be ſhewn that they were *miſled*.

Fraud is an extrinſic collateral act, which vitiates the moſt ſolemn proceedings of courts of juſtice. Lord *Coke* ſays it avoids all judicial acts, eccleſiaſtical or temporal.

In *civil ſuits* all ſtrangers may falſify, for coven, either fines or real or feigned recoveries, and even a recovery by a juſt title, if colluſion was practiſed to prevent a fair defence; and this whether the coven is apparent upon the record, as not eſſoining, or not demanding the view, or by ſuffering judgment by confeſſion or default, or extrinſic, as not pleading a releaſe, collateral warranty, or other advantageous pleas.

In *criminal proceedings*, if an offender is convicted of felony, on confeſſion, or is outlawed, not only the time of the felony, but the felony may be traverſed by a purchaſer,

purchaſer, whoſe conveyance would be affected as it ſtands; and, even after a conviction by verdict he may traverſe the time *.

In the proceedings of the eccleſiaſtical court the ſame rule holds. In *Dyer* there is an inſtance of a ſecond adminiſtration, fraudulently obtained, to defeat an execution at law againſt the firſt; and the fact being admitted by demurrer, the court pronounced againſt the fraudulent adminiſtration. In another inſtance an adminiſtration had been fraudulently revoked; and the fact being denied, iſſue was joined upon it, and the colluſion being found by a jury, the court gave judgment againſt it.

In the more modern caſes, the queſtion ſeems to have been, whether the *parties* ſhould be permitted to prove colluſion; and not ſeeming to doubt but that ſtrangers might.

So that colluſion, being a matter extrinſic of the cauſe, may be imputed by a ſtranger, and tried by a jury and determined by the courts of temporal juriſdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there ſeems as much reaſon to prevent the miſchiefs ariſing from colluſion in the eccleſiaſtical courts, which from the proceedings, are at leaſt as much expoſed, and which we find have been, in fact, as much expoſed to be practiſed upon for ſiniſter purpoſes, as the courts in *Weſtminſter-hall*.

We are therefore unanimouſly of opinion—

Firſt, That a ſentence in a ſpiritual court againſt a marriage in a ſuit of jactitation of marriage is not concluſive evidence, ſo as to ſtop the counſel for the crown

* So an acceſſary indicted, after the conviction of the principal, for the felony of receiving ſtolen goods, may controvert the guilt of the principal notwithſtanding the record of his conviction; and if it appear that the goods were taken under circumſtances that do not amount to larceny, the acceſſary ſhall be acquitted †. *Smith's caſe*, *Leach. Cr. Law.* 2 *edit.* 237. 3 *edit.* 323.

† *M'Daniel's caſe*, *Foſt. Cr. L.* 121. 365. Poſt 463.

from

from proving the marriage in an indictment for polygamy. But,

Secondly, Admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion. 11 *St. Tr.* 201. 205 to 237. 261, 262.

In STEDMAN *v.* GOOCH. *Niſi Prius*, *Eaſter*, 33 *Geo.* 3. *Erſkine*, for the plaintiff, in ſupport of the iſſue on the ſecond plea, which was coverture, ſtated that the evidence he had to that effect was firſt a ſentence of the eccleſiaſtical court, by which the defendant and her huſband were ſeparated; ſecondly, ſeparate maintenance. To prove the ſeparation, he produced and proved the *ſentence* of the ſpiritual court, by which a divorce *a menſa et thoro* was pronounced between the parties.

Mingay objected that the production of the ſentence alone was not ſufficient evidence, that the libel and all the proceedings in that court ſhould likewiſe have been produced in court.

Lord KENYON, C. J. ſeemed diſpoſed to be of opinion that the ſentence alone was ſufficient; but he reſerved the point, and in the enſuing term the queſtion was agitated, and the other judge ſeemed to concur with the chief juſtice—but no judgment has been given. *Eſpin. Rep.* 6. 8.

NOTE.—In the *Dutcheſs of Kingſton's caſe*, all the proceedings were read before the lords.

Rule the Fourth.

A record of conviction of treaſon, felony, or any other crime infamous in its nature, is a concluſive exception and bar to the competency of the perſon ſo convicted when offered as a witneſs. 2 *Hawk. P. C. ca.* 46. Vide *ca.* 18. *ante* 206. On the competency of perſons attainted; and *ca.* 19. *ante* 313, on their reſtoration to competency.

Rule the Fifth.

If the principal and acceſſary are joined in one indictment and tried together, the acceſſary may enter into the

the full defence of the principal; avail himſelf of every matter of fact and every point of law tending to his acquittal. *Foſt. Cr. La.* 365. Vide 2 & 3 *Edw.* 6. *ca.* 24. *Ante* 462.

For the acceſſary is in this caſe to be conſidered as *particeps in lite*, and this ſort of defence neceſſarily and directly tendeth to his own acquittal.

Rule the Sixth.

The conviction of the principal is evidence againſt the acceſſary ſufficient to put him upon his defence; but it is not concluſive evidence againſt him.

This rule is founded on the opinion of *Foſter*, who ſays, when the acceſſary is brought to his trial after the conviction of the principal, it is not neceſſary to enter into a detail of the evidence, on which the conviction was founded. Nor doth the indictment aver, that the principal was in fact guilty. It is ſufficient if it reciteth with proper certainty the record of the conviction. This is evidence againſt the acceſſary ſufficient to put him upon his defence. For it is founded, on a legal preſumption, that every thing in the former proceeding was rightly and properly tranſacted. But a preſumption of this kind muſt give way to fact manifeſtly and clearly proved. As againſt the acceſſary, the conviction of the principal will not be concluſive; it is as to him *rei inter alios acta*. *Foſter's Cr. Law.* 365.

Rule the Seventh.

And therefore if it ſhall come out in evidence, upon the trial of the acceſſary, as it ſometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that ſpecies of felony with which he was charged, the acceſſary ſhall avail himſelf of this and ought to be acquitted. *Foſt. Cr. Law*, 365. 9 *Co.* 118. *Lord Sanchar's caſe.*

As in the KING *v.* M'DANIEL, *and others*, *Old-Bailey ſeſſions*, *December*, 1755. Certain youths who were convicted of

of robbery being totally ignorant of the conſpiracy, mentioned in the report of that caſe, took no advantage of it, and were convicted upon full legal evidence. But when the whole ſcene of villainy came to be diſcloſed upon the trial of thoſe miſcreants, they were diſcharged from that indictment upon this ſingle objection—that the offence of the principals did not, in the eye of the law, amount to robbery. *Foſt. Cr. Law* 365.

FOSTER then puts this caſe in illuſtration. *A.* is indicted for ſtealing a quantity of live fiſh, the property of *B.* *A.* pleadeth guilty upon his arraignment, is immediately burnt in the hand and diſcharged. At the next ſeſſions *C.* is indicted as an acceſſary to *A.* in this felony after the fact, as the receiver, knowingly. *A.* is produced as a witneſs againſt him, and in the courſe of his evidence proveth, that the fiſh were taken in a river, of which *B.* had the ſole and ſeveral fiſhery, or in a large pond upon the waſte of *B.* Might not *C.* had he been ſo adviſed have inſiſted that the fiſh being at their natural liberty, *B.* had no fixed property in them, and conſequently that the taking of them *in that ſtate*, could amount to no more than a bare treſpaſs. Undoubtedly he might. *Foſt. Cr. Law*, 336.

This rule is further illuſtrated in the KING *v.* SMITH, *Old-Bailey, December ſeſſions*, 1783. The priſoner was indicted on the ſtatutes 3 *Will. & Mary, ca.* 9. *ſec.* 4. and 5 *Anne, ca.* 3. *ſec.* 5. *Iriſh*, as an acceſſary after the fact in receiving a quantity of flour, the property of *John Peacocke*, knowing to be ſtolen.

It appeared that two perſons of the names of *Gilbertſon* and *Wareham*, who were ſervants to the proſecutor at the time that the felony was committed, had made a full and free confeſſion of the fact of taking the flour from their maſter, and that *Wareham* had been convicted as a principal felon on the evidence of *Gilbertſon*, who had been admitted an evidence for the crown.

The record of *Wareham*'s evidence was produced, but on the authority of *M'Daniel*'s caſe above cited, the court permitted the priſoner's counſel to controvert the propriety of that conviction by *viva voce* evidence; and it in fact appeared that the proſecutor had intruſted

Wareham with the flour in ſuch a way as to make the converſation of it a *breach of truſt* only, and not a felony. The priſoner was accordingly acquitted. *Leach's Cr. Caſes*, 3 *edit.* 324.

In *February ſeſſions*, 1784, *at the Old-Bailey*, *Philip Proſſor* was indicted as an acceſſary before the fact in procuring one *Rothewell* to counterfeit a halfpenny. The record of *Rothewell's* conviction was produced, and it was admitted by GOULD, J. upon the authority of *Foſter*, that the record of the conviction of the principal was not concluſive evidence of the felony againſt the acceſſary, and that he has a right to controvert the propriety of ſuch conviction, for a record is only concluſive evidence againſt thoſe who are parties to it. *Leach. Cr. Ca.* 3 *ed.* 324. Vide *the dutcheſs of Kingſton's caſe. Ante* 454.

Rule the Eighth.

So the principal or acceſſary can avail himſelf in point of *fact* as well as in point of law, by ſhewing againſt the evidence of the record by the teſtimony of witneſſes that the principal was totally innocent.

Foſter conſiders that this rule ſhould be received with great caution; becauſe *facts* for the moſt part depend upon the *credit* of witneſſes, and when the ſtrength and hinge of a cauſe happeneth to be diſcloſed, as it may be by one trial, witneſſes for bad purpoſes may be eaſily procured. *Foſt.* 366.

He then ſtates, which is in favour of the rule, a reſolution of the judges in lord *Sanchar's* caſe, *Trinity*, 10 *Jac.* 1. The principal is outlawed, and thereupon the acceſſary is tried, convicted, and executed. The principal afterwards cometh in, reverſeth the outlawry, and pleadeth over to the felony, and upon his trial (of courſe upon evidence of facts controverting the record) is acquitted. This, ſaith *Coke*, reverſeth the attainder of the acceſſary. 9 *Co.* 119. *Foſt.* 367.

It hath been premiſed, that in order to convict the acceſſary it is not neceſſary to enter into the detail of the evidence upon which the principal was convicted: but ſtill, if it ſhall manifeſtly appear in the courſe of the acceſſary's

acceſſary's trial that in point of *fact* the principal was innocent, common juſtice ſeemeth to require that the acceſſary ſhould be acquitted *Foſt.* 367.

A. is convicted upon circumſtantial evidence, ſtrong as that ſort of evidence can be, of the murder of *B.* *C.* is afterwards indicted as acceſſary to this murder, and it cometh out upon the trial, by inconteſtible evidence, that *B.* is ſtill living. Is *C.* to be convicted or acquitted? The caſe is too plain to admit of a doubt. *Ib.*

NOTE.—Lord HALE mentions a caſe of this kind; and not many years ago, a man was arraigned at the commiſſion of *Oyer and Terminer*, *Dublin*, for the murder of his wife, who to the aſtoniſhment of the court, and infinite ſatisfaction of the priſoner at the bar, from whom ſhe had eloped, made her appearance. *MS.*

Or ſuppoſe *B.* to have been in fact murdered, and that it ſhould come out in evidence, to the *ſatisfaction of the court and jury*, that the witneſſes againſt *A.* were miſtaken in his perſon. A caſe of this kind I have known, that *A.* was not, nor could poſſibly have been, at the murder. *Foſt.* 367.

Mere *alibi* evidence, it muſt be admitted, lieth under a great and general prejudice, and ought to be heard with uncommon caution. But if it appeareth to be founded in truth, it is the beſt negative evidence that can be offered; it is really poſitive evidence, which in the nature of things neceſſarily implieth a negative. And in many caſes it is the only evidence an innocent man can offer. What, in the caſe I have put, are a court and jury to do? If they are *ſatisfied upon the evidence* that *A.* was innocent, natural juſtice and common ſenſe will ſuggeſt what is to be done in the caſe of *C.* *Foſt.* 368.

If theſe caſes prove that in any caſe whatſoever the legal preſumption againſt the acceſſary, founded on the conviction of the principal, may be repelled by contrary evidence, they prove as much as can be expected from them. The RULE IS RIGHT, the difficulty will lie in the application of it to particular caſes. How far it is to be carried to caſes probably not equally ſtrong, muſt,

all circumſtances duly weighed and conſidered, be left to the prudence, circumſpection, and abilities of the learned judges before whom the ſeveral caſes may happen to come in judgment. *Ibid.*

Rule the Ninth.

On an indictment for perjury, the *poſtea* of a former iſſue is good evidence that there was a trial.

As in PILTON *v.* WALTER, *Surrey Aſſizes*, 5 *Geo.* 3. by PRATT, C. J. who ruled that the bare producing the *poſtea* is no evidence of the verdict, without ſhewing a copy of the final judgment; becauſe it may happen the judgment was arreſted, or a new trial granted. But it is good evidence, that a trial was had between the ſame parties, ſo as to introduce an account of what a witneſs ſwore at that trial, who is ſince dead. 1 *Stra.* 162.

And in the KING *v.* ISLES, *Niſi Prius*, *London*, *Mich.* 14 *Geo.* 2. before lord RAYMOND, C. J. On an indictment for perjury in what the defendant ſwore on a trial as a witneſs, the *poſtea* was ruled to be good evidence to ſhew there was a trial ſo as to introduce the evidence given, on which the perjury was aſſigned. *Barnard. K. B.* 243. So,

In the KING *v.* MIMMS, *Niſi Pri. Weſtminſter*, 32 *Geo.* 3. the ſame point was ruled. *Eſpin. N. P.* 750.

Rule the Tenth.

An office copy of an anſwer to a bill in equity may be given in evidence in a civil ſuit; but not on an indictment for perjury; though perhaps ſuch copy would be ſufficient for the grand jury to find the bill: but on the trial the original muſt be produced and poſitive proof made that the defendant was ſworn by a witneſs acquainted with him. *Bull. N. P.* 239.

And no return of commiſſioners of a maſter in chancery, or of the party's ſwearing, will be ſufficient, without ſome proof of the party's identity. *Ibid.*

So in the KING *v.* ———. *Mich.* 2 *Jac.* 2. at bar. An information was exhibited againſt the defendant for perjury;

jury; ſetting forth, that a bill in chancery was exhibited by one *A. B.* and the proceedings thereon.

The perjury was aſſigned in a depoſition made by the defendant, thirtieth of July, 1683, and taken in that cauſe, before *commiſſioners in the country*.

This cauſe was tried at bar, and the queſtion was, whether the return of the commiſſioners, that the defendant made oath before them, ſhall be ſufficient evidence to convict him of perjury, without their being preſent in court to prove him the very ſame perſon.

Pemberton, ſerjeant, for the defendant, inſiſted that the commiſſioners muſt be in court or ſome other perſon to prove that he was the perſon who made the oath before. He argued that, the commiſſioners ſign the depoſitions, and they ought to produce them ſo ſigned to the court and prove it; for depoſitions are often ſuppreſſed by the court.

If a true copy of an *affidavit* made before the chief juſtice of this court be produced at a trial, it is not ſufficient to convict a man of perjury. This is not like the caſe of perjury aſſigned in an anſwer in *chancery* taken in the country, for that is under the party's hand; but here nothing is under the defendant's hand; and therefore the commiſſioners ought to be in the court, to prove him to be the man.

The COURT were equally divided: the CHIEF JUSTICE and WIGTHAM, J. were of opinion, that it was not evidence to convict the defendant of perjury; it might have been otherwiſe upon the return of a maſter of *chancery*, for he is upon his oath, and is therefore preſumed to make a good return; but commiſſioners are not upon oath, they pen the depoſitions according to the beſt of their ſkill, and a man may call himſelf by another name before them without any offence.

The commiſſioners can not be miſtaken in the oath, though they may not know the perſon; for this court may be ſo miſtaken in thoſe who make *affidavits* here, but not in the oath; if the commiſſioner, or the clerk to the commiſſioner had been here, they would have been good evidence.

If an *affidavit* be made before a juſtice of the peace, of a robbery, as enjoined by the ſtatute; if you will convict

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the perſon of perjury, you muſt prove the ſweating of the affidavit. 3 *Mod.* 117.

Rule the Eleventh.

But proof, that a perſon calling himſelf *John Doe* was ſworn, and that he ſigned the anſwer in equity, or the affidavit on which the perjury is aſſigned; and proof by another witneſs of the hand writing, is ſufficient to intitle the crown to read, as evidence, the anſwer or affidavit. *Bull. N. P.* 239.

Rule the Twelfth.

So an anſwer being brought out of the proper office, and the jurat under the maſter's hand, and proof of it being ſigned by the defendant, by proof of his hand writing, is ſufficient to prove it ſworn by him, even on an indictment of perjury. *Bull. N. P.* 239.

This rule is illuſtrated in a note to the KING, *v.* NUNEZ, 9 *Geo.* 2. where it is ſaid, N. B. In *Scaccario*. The defendant ſigns his anſwer, for the proof here to read it, was only the hand writing of the baron and of the defendant. 2 *Stra.* 1043. *Theory of Evid.* 102.

And in the KING, *v.* JOHN MORRIS, *Niſi Prius, after Eaſter term*, 1 *Geo.* 3. 1761. The defendant was convicted of wilful and corrupt perjury, in an anſwer in chancery.

Lord MANSFIELD, who tried him, made his report. He ſtated an objection to the evidence which had been made by the defendant's counſel at the trial, *viz.* "that "there was no proof of the *identity* of the perſon who "ſwore the anſwer; nor even proof that *any perſon* at "all ſwore it." This objection, he ſaid, he had overruled at the trial, thinking it ſufficient that the hand of the defendant and of the maſter were proved. But he deſired to have the opinion of his brethren on this point, that the defendant might have the benefit of the objection, if it ſhould ſeem to them to have any force in it, though he declared himſelf to be ſtill clear in his former opinion.

DENISON

DENISON and WILMOT, J's. (FOSTER abſent) concurred with his lordſhip, and they were all clearly and unanimouſly of opinion, that as the name ſubſcribed to the anſwer was proved to be the defendant's hand writing, and the maſter had proved that the *jurat* was ſubſcribed by him the maſter, as being ſworn before him; this was ſufficient proof "that he was the ſame perſon," and alſo, "that he actually ſwore it;" for the very reaſon why the court of chancery, ſome time ſince, made a general order, "that all defendants ſhould ſign their anſwers," was with the "very view to the more eaſy proof of perjuries "in anſwers." And as to the actual ſwearing, it is in the nature and courſe of buſineſs, quite neceſſary to take the *jurat*, atteſted by the proper perſon before whom the oath ought to be taken, as ſufficient proof of it's being actually ſworn by the perſon, ſo far at leaſt, as to put it upon him to ſhew, or to raiſe a reaſonable ſuſpicion, "that he was perſonated," as it would otherwiſe be almoſt impoſſible to convict any one of perjury committed in an anſwer on chancery. 2 *Burr.* 1189. *Leach's Cr. Ca.* 2 *edit.* 48. 3 *edit.* 60. Vide 1 *Show.* 397.

So in the KING, *v.* HARE, *commiſſion of oyer and terminer, Dublin, February*, 1795.

Indictment for perjury, before CHAMBERLAIN, J. It was ruled, on an objection made by defendant's counſel, that the *Baron* before whom the anſwer, on which the perjury aſſigned had been ſworn, need not be produced as a witneſs to prove the ſwearing of the anſwer before him, and that evidence of his hand writing, and the hand writing of the party on trial, ſubſcribed to the anſwer in the uſual way, was ſufficient to authorize the reading of the anſwer. And CHAMBERLAIN, J. ſaid, he had conſulted the judges, ten of whom (KELLY and METGE abſent) were unanimous for admitting the evidence.

The KING, *v.* THOMAS BRADY, *Old-Baily, July ſeſſions*, 1784, ſeems an exception to the laſt rule, but perhaps may be rather conſidered as independent of it. The priſoner was tried before ADAIR, Recorder of *London*, on the *ſtat.* 31 *Geo.* 2. *ca.* 10. *ſect.* 24. The indictment charged, "That he, *Thomas Brady*, well know-

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" ing that one *Michael Power*, deceaſed, had ſerved our " lord the king on board the *Pallas*, and that certain " wages and pay were due to him for ſuch ſervice, came " on the 18th of *November*, 1783, before the worſhip- " ful *James Harris*, then ſurrogate to the right wor- " ſhipful *Peter Calvert*, Eſq; LL. D. and unlawfully, " knowingly, and *felonioufly*, did take a *falſe oath*, that " the ſaid *Michael Power* was dead, without making " any will, and that he, the ſaid *Thomas Brady*, was his " brother and next of kin, whereas in truth and in fact, " the ſaid *Thomas Brady* was not the brother of the ſaid " *Michael Power*; with intent to obtain letters of admi- " niſtration, in order to receive the ſaid wages and pay, " due and owing to the ſaid *Michael Power*, on account " of his ſaid ſervice." There was a ſecond count, charging, " That he ſuppoſing wages due, &c."

The evidence was, that the *priſoner*, accompanied by another ſeaman, in *November* 1783, went to Mr. *Mackintoſh*, a navy agent, and told him that he had a brother who died on board the *Pallas*, and wanted to adminiſter to him, for the purpoſe of receiving his wages; that his name was *Thomas Power*, and that he had neither father, mother, brother, nor ſiſter, living; that *Mackintoſh* introduced him to *Shepherd*, and that he witneſſed *the warrant* in the regiſtry of the prerogative court of *Canterbury*, by which warrant it appeared that a man calling himſelf *Thomas Power* had taken the uſual oath, to wit, " That *Michael Power* died a batchelor, inteſtate, " without parent, and that *he* was the natural and law- " ful brother of the deceaſed." That this warrant was ſigned by the name *Thomas Power*, and that the *jurat* was atteſted by doctor *Harris*, but who the man was that had ſo taken this oath, or whether the ſignature was the hand writing of the priſoner, the witneſs *Shepherd* could not ſwear. It alſo appeared, that a man who called himſelf *Thomas Power*, had ſigned the bond; that the bond was witneſſed by *Mackintoſh* and one *Thomas Cruſo*, but that *Mackintoſh* could not tell who the perſon was who had ſigned it, and *Thomas Cruſo* could not be found. It alſo appeared, that the *priſoner* had applied on the 15th of *January* to *Charles Pinkſton*, a clerk to one *Harper*,

Harper, a navy agent, in the name of *Thomas Brady*, with a certificate ſigned by the purſer of the ſhip *Pallas*, and an order to receive ſome prize-money; that while he was thus waiting in *Harper's* office, *Mackintoſh*, the perſon by whoſe means he procured letters of adminiſtration to *Michael Power* went in, and finding that he was uſing a different name, ſuſpected him, and procured him to be apprehended. On inquiry, it turned out, that his real name was *Thomas Brady*, that he had been an able ſeaman on board the *Pallas*; and that there was another able ſeaman on board the ſame ſhip, of the name of *Michael Power*, but that he had no brother.

The COURT. The *ſtatute* on which this indictment is founded, enacts, "That whoſoever willingly and knowingly takes *a falſe oath*, to obtain the probate of any will or wills, or to obtain letters of adminiſtration, in order to receive the payment of any wages, pay, or other allowances of money, or prize-money *due*, or that were *ſuppoſed to be due*, to any officer, ſeaman, or other perſon who has really ſerved on board any ſhip or veſſel in the king's ſervice, ſhall be guilty of felony, without benefit of clergy."

At common law, perjury is a *miſdemeanor* only; but, by this ſtatute, this particular ſpecies of perjury is converted into a particular felony: but it is ſtill incumbent on the proſecutor to fit the evidence to the particular fact, and to prove every circumſtance which is neceſſary, to bring it within the range of the law, not only by clear, preciſe, and exact evidence, but by the *beſt evidence* that is poſſible to be produced.

Now, on the preſent indictment, the jet of the crime is the taking the *falſe oath*, and there is no inſtance where an indictment for *perjury* has been ſupported, without direct and poſitive proof, that the party took the oath on which the perjury is aſſigned; or where the evidence of that fact has been attempted to be ſupplied by inference of the other circumſtances of the caſe.

In the preſent caſe, there is certainly no expreſs, direct evidence, that the priſoner took the oath in queſtion, but circumſtantial evidence only.

The fact of a priſoner's having taken the oath, requires as diſtinct a proof as the fact does, of his having executed the bond: but Mr. *Shepherd*'s memory will not ſerve him as to the perſon who took the oath; and doctor *Harris* not being here, there is no direct proof of it. The evidence therefore is defective; for there certainly is a poſſibility, from any thing that has been given in evidence to the contrary, that the priſoner might have gone through all the reſt of the fraud, and have avoided the circumſtance of having taken the oath; eſpecially as he probably knew that the taking of the oath was a capital felony. If this were an indictment for perjury at common law, it would have been incumbent on the proſecutor to give preciſe and poſitive proof, that the priſoner was the perſon who took the oath; and it is equally incumbent on him ſo to do on the preſent occaſion; for the part where the proof is defective, is the very point on which his guilt or innocence turns.

The counſel for the crown, requeſted the caſe might be ſaved for the opinion of the judges, on a queſtion, whether on an indictment on this ſtatute, it was neceſſary to have direct proof of the priſoner having taken the oath, or whether that fact might not be inferred by the jury, from the other circumſtances of the caſe.

The COURT told the jury, that if, notwithſtanding the above obſervations, they were ſatisfied that the priſoner actually took the oath, they might find him guilty; but that as the fact was not clearly proved, they ought to acquit him—which they did. *Leach. Cr. Ca.* 3 *edit.* 368.

Rule the Thirteenth.

Written evidence, as well as parol, may be explained by the party ſwearing: wherefore, if a defendant in a court of equity, by a ſecond anſwer, explains what he has ſworn to in a firſt anſwer, nothing can be aſſigned in an indictment for perjury, of courſe nothing can be proved on the trial of that indictment that was ſo explained.

As in an information for perjury, and the perjury aſſigned was in the defendant's anſwer, "That he re-

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" ceived no money;" and on exceptions taken for inſufficiency, the defendant ſays, in a ſecond anſwer, "That " he received no money until ſuch a day;" and on the trial of the information it was held, that nothing ſhould be aſſigned for perjury that was explained in the ſecond anſwer: for the firſt anſwer ſhall be charitably expounded, according to what appears to be the parties ſenſe in the ſecond anſwer; for the court would rather intend there was ſome overſight in the draft, and that it was afterwards amended in the ſecond anſwer, than ſuppoſe the party to be guilty of wilful and corrupt perjury. 1 *Siderf.* 418, 19. 2 *Keb.* 516.

NOTE. It muſt be taken of courſe, that the *day* was *material* to the cauſe, ſo that non-receipt until after ſuch a day, would come within the ſenſe as to the matter before the court of *non-receiver* generally. *Loft in Gilb. Ev.* 55. Vide *Henry, v. Watſon. Ante*

CHAPTER IV.

Of Written Evidence inferior to matter of Record.

Rule.

THE books of public offices, and of public bodies, which of courſe are not intereſted in the event of the trial, are admiſſible evidence.

As in the KING, *v.* DOMINICK FITZGERALD, and JAMES LEE, *Old-Bailey ſeſſion*, 1741. Indicted for forging a paper, purporting to be the laſt will and teſtament of *Peter Perry*, late a ſeaman on board his majeſty's ſhip *Lancaſter*, with intent to defraud the king.

It was proved by the *muſter-book*, tranſmitted by the officers of the ſhip to the navy-office, that *Peter Perry* belonged to the ſhip *Lancaſter*, that at the time of his deceaſe there were 42*l.* 6*s.* due to him; and that a ticket for the payment of the ſame was made out, and delivered to a perſon who brought the probate of the will in queſtion.

The COURT, the priſoner being found guilty, reſerved this queſtion for the judges—Whether the *muſter-book* was admiſſible evidence? but though they met on the queſtion, their opinion was never publiſhed, and the defendant was hanged. However it appears in the next caſe. *Leach. Cr. Ca.* 2 *edit.* 20. 3 *Edit.* 24. 29.

The KING, *v.* ROBERT RHODES, *April ſeſſ. Old-Bailey*, 1742. Indicted as in the laſt cited caſe, for forging the laſt will of *John Thompſon*, late of his majeſty's ſhip the *Flamborough*.

It appeared by the evidence of the clerk of the ticket-office, in the navy-office, that it was cuſtomary for the captains of men of war to tranſmit accounts of their crews to the navy-office, as frequently as poſſible, and that theſe accounts are entered regularly in muſter-books, containing the names of all thoſe who are living, dead, or have run away. The *muſter-book* belonging to the *Flamborough* was produced, in which there was this entry: "*John Thompſon*, an able ſeaman, died 22 *Au-* "*guſt*, 1739, at Turtle-bay, on board the *Flamborough*."

The priſoner's counſel contended, that as the priſoner was charged with forging the will of *Thompſon*, it was incumbent on the proſecutor to prove, by the beſt evidence the nature of the fact would admit of, that the teſtator was dead, and that the beſt evidence of that fact was, by ſome one of the many perſons who were on board the ſhip, and not by the accounts of the captain or other officers, who might by accident or deſign, return the man dead when he was really alive.

The counſel for the crown, anſwered, that the objection was incongruous on the part of the priſoner, for that he had actually proved the will in Doctor's Commons, and received the wages at the navy-office, by virtue of the probate, which implied an acknowledgment by him, that *Thompſon* was dead; but that excluſive of that reaſon, it was the conſtant courſe and uninterrupted practice of the court to admit the entry of the muſter-book, after it had been authenticated by the clerk who ſigned it. The COURT over-ruled the objection, and cited the laſt caſe, *Leach's Cr. Ca.* 2 *Edit.* 23. 3 *Edit.* 29. Vide *Sterling's* caſe. *Ante* 429.

So

So in the caſe of RICHARD RAMSBOTTOM, *Old-Bailey, September ſeſſions*, 1787, indicted for forging a ſeaman's will. To prove the probate revoked, *Thomas Fletcher*, a clerk in the prerogative court, produced an entry of the revocation in a book called, *The Aſſignation Book*, in which all cauſes are entered by the regiſter, and which was kept officially by the witneſs, as the only record of ſuch proceedings, and of the decrees of the court. It was objected that this book was not admiſſible evidence.

The COURT were clearly of opinion, that it was evidence to prove the fact of the probate being revoked. *Leach. Cr. Ca.* 3 *Edit.* 30.

In the KING, *v.* AICKLES, *Old-Bailey, September ſeſſ.* 1785. *Aickles* was ſentenced to be tranſported for ſeven years. On an indictment for returning from tranſportation, and being found at large without any lawful cauſe, before the expiration of that term, it was held incumbent on the proſecutor to prove the preciſe day on which the priſoner was diſcharged from Newgate.

The clerk of the papers of the priſon, produced a *daily-book*, which he kept, containing entries of the names of all the debtors and perſons who are brought into priſon on warrants for crimes, and when they are diſcharged. But theſe entries were not made from the clerks own knowledge of the facts, but that he generally made them from the information of the turnkeys, and frequently from the turnkeys indorſements on the back of the warrants, which warrants were afterwards regularly filed.

It was contended by the priſoner's counſel, that theſe were not *original* entries of the facts; and that therefore the turnkey himſelf, by whom *Aickles* was diſcharged, or the original minute from which the entry of his diſcharge had been made, ſhould be produced, becauſe they alone were the beſt evidence upon this ſubject, and it was in the proſecutor's power to produce it. They compared the evidence offered, to the production of a merchant's ledger, in order to prove the delivery of goods, inſtead of producing the original day-

day-book, from which the ledger had been poſted, and they argued, that no credit could be given to entries made intirely from hearſay and information, and therefore theſe entries ought not to be received in evidence.

GOULD, J. HOTHAM, B. and ADAIR, Recorder, however determined that the entry in this book might be given in evidence. It is a book very different in its nature from the books or memorandums of tradeſmen. It appears to have been the conſtant and long eſtabliſhed practice of the keepers of a public priſon to regiſter the diſcharge of priſoners in ſuch a book as the one produced, and in the manner which the witneſs hath deſcribed. The clerk of the papers is a public officer in the priſon, and the law repoſes ſuch a confidence in public officers, that it *preſumes* they will diſcharge their ſeveral truſts with accuracy and fidelity, and therefore whatever act they do, in diſcharge of their public duty, may be given in evidence, and ſhall be taken to be true, under ſuch a degree of caution as the nature of the circumſtances of each caſe may appear to require, except the *falſity* of them may be made to appear, for every *preſumption* may be repelled by contrary evidence. In the preſent caſe the clerk of the papers has no private intereſt whatſoever in this book to induce him to make fictitious entries in it. He is a public officer recording a public tranſaction. Any perſon may undoubtedly falſify the entries, if he can; but unleſs the truth of the entry, as to the preſent fact can be impeached, it is admiſſible evidence. *Leach. Cr. Ca.* 2. *edit.* 303. 3 *edit.* 437.

In the caſe of the KING *v.* MOTHERSELL, *Eaſter*, 4 *Geo.* 1. Motion for a new trial. On an information in nature of a *quo warranto*, the proſecutor produced in evidence a book which appeared to be only minutes of ſome corporate acts of the year paſt, all written by the proſecutor's clerk, who was no officer of the corporation. The admiſſibility of this evidence was oppoſed, the book having never been kept, nor conſidered as one of the corporation's books in which entries were made by the town-clerk, and there being ſome ſuſpicion that the book was not genuine. The JUDGE required

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an account of where the book had been kept for the preceding ten years, and whether any body had ſeen it before, which the proſecutor not being able to give he rejected the evidence offered.

Et per CURIAM corporation books are generally allowed to be given in evidence, when they have been publicly kept as ſuch, and the entries made by the proper officer; not but entries made by other perſons may be good, if the town-clerk be ſick or refuſes to attend, but then, that muſt be made appear by evidence. Whoever produces a book, muſt eſtabliſh it before he delivers it. Parties producing deeds muſt give an account where they have been kept, and how they were come by. Therefore we are of opinion, this evidence thus offered was well over-ruled, and conſequently a new trial was refuſed. 1 *Strange*, 93.

So in PITTON *v.* WALTER, *Surrey aſſizes*, 5 *Geo.* 1. The queſtion being whether the leſſor of the plaintiff was heir at law to him who laſt died ſeiſed. To prove the pedigree, the chief juſtice admitted a viſitation in 1623, made by the heralds, entered in their books and kept in their office, to be read in evidence. He alſo admitted the minute book of a former viſitation, ſigned by the heads of ſeveral families, which was found in the library of lord *Oxford*. 1 *Stra.* 162. *Barnard*, *K. B.* 243.

It hath been decided in DANIEL HOET's caſe, convicted on two informations for libels that a *gazette* is evidence of all acts of ſtate.

And therefore a gazette in which it was ſtated that certain addreſſes had been preſented to the king from different bodies of ſubjects expreſſing their loyalty, &c. was admitted in evidence to prove an averment in an information for a libel, "that divers addreſſes had been preſented "to his majeſty by divers of his loving ſubjects," &c. 5 *Term. Rep.* 436.

CHAPTER

CHAPTER V.

Of the Operation of the Stamp-Acts relative to Evidence.

Rule the Firſt.

EVERY written, engroſſed, or printed paper, vellum, or inſtrument which are required by act of parliament to be ſtamped, are inadmiſſible in evidence unleſs they are ſtamped. *Stat.* 33 *Geo.* 3. *ca.* 49. *ſect.* 14. *and* 23 *Geo.* 3. *ca.* 58. *ſect.* 11. *Same prohibition in the Iriſh Stamp-acts.*

Rule the Second.

But, the above prohibitory rule is reſtricted to civil ſuits, for, on indictments for forging a bill of exchange, promiſſory note, or any other ſecurity for money or other writing liable to a ſtamp duty, the forged paper, or inſtrument, may be given in evidence, although it is *not* ſtamped, purſuant to the ſtatutes.

As in the KING *v.* HAWKSWOOD, *Worceſter Lent aſſizes*, 1783. The priſoner was indicted for forging a negotiable bill of exchange, purporting to be drawn by a perſon named *Prattington*, on Sir *Robert Herries*, and Co. and alſo for forging two indorſements on the ſame, the one in the firm of *Cox & Davey*, and the other in the name of *James Hayden*. There were alſo the uſual counts for uttering it, knowing it to be forged.

The fact of its being a forgery, and that the priſoner had negotiated it with a complete knowledge of that fact were clearly proved, but upon producing the bill in evidence, it appeared not to be ſtamped purſuant to the ſtatutes, which enact, "that no bill of exchange, &c. "not ſtamped as thoſe acts direct, ſhall be pleaded or "given in evidence in *any* court, or admitted in *any* "court to be good or available in law or equity."

Baldwin, for the priſoner, ſubmitted, that the inſtrument in queſtion, even ſuppoſing it to be genuine, was not

not a lawful bill of exchange, but a piece of waſte paper, incapable of becoming the ſubject of either fraud or felony; that the party who took it muſt at the time have known that it was not a legal bill of exchange, or muſt be groſsly negligent, for the defect was viſible on the face of it.

BULLER, J. held, that the ſtamp acts, being revenue laws, and not purporting to alter the crime of forgery, could not affect the preſent queſtion, and the jury found the priſoner guilty: but the point being new he reſpited the judgment, and reſerved the caſe for the conſideration of the judges.

In *Eaſter term*, 1783, the judges over-ruled the objection, and determined the conviction was right. *Leach's Cr. Ca.* 2 *edit.* 221. 3 *edit.* 293.

So in the KING, *v.* JOHN LEE, *Old-Bailey*, *January ſeſſions*, 1784.

The priſoner was indicted for forging a bill of exchange, purporting to be made by lord *Townſhend*, maſter of the ordnance, and to be drawn on the ordnance office, Whitehall, where no ſuch office was held.

Mac Nally, for the priſoner, objected to the reading of this paper, on the ground that it was not ſtamped purſuant to the ſtatute, and therefore was to be admitted in evidence. It was not, he ſaid, a bill of exchange, for it wanted a component part, made neceſſary to its perfection, and ordered to be annexed to it by ſtatute; without the annexation of the ſtamp, required by law, it was not negotiable. A bill of exchange was ſuch an inſtrument as ſhould have certain qualities to render it current to all the world. A ſtamp, ſince the ſtatute, was indiſpenſible, to conſtitute the credit and currency of bills of exchange and promiſſory notes; they were repreſentatives of money, and to ſupport that character viſibly, required a ſtamp, as much as gold or ſilver required the uſual mint impreſſion, without which thoſe metals could not paſs as coin. If offered on Change, in ſuch a deficient ſtate, it would be rejected and diſhonoured, as peremptorily as if it wanted the name of a drawer, or the ſignature of an acceptor, which were

conſtituent parties to a bill of exchange. It is an inſtrument of no value in its preſent ſtate, intrinſic or extrinſic, and by the act of parliament it was prohibited from being "pleaded or given in evidence in any court, or "admitted to be good or available in law or equity."

The COURT over-ruled the objection, on the authority of the laſt preceding caſe. The *King*, v. *Hawkſwood*. *Ante* 480.

The KING, *v.* COLIN RECULIST, *Old-Bailey*, *January ſeſſions*, 1796, the above objection was revived.

The priſoner was tried on an indictment for uttering a promiſſory note, knowing it to be forged, with the name of *William Howard*. The note had no ſtamp upon it, and it was therefore contended that it could not be given in evidence, and the ſtamp-acts were cited.

The jury found the priſoner guilty; but THOMPSON, B. reſpited the judgment, for the opinion of the judges.

GROSE, J. in *May* ſeſſions following, delivered the opinion as follows: The crime, as charged againſt the priſoner, by the words of the indictment, was clearly and ſatisfactorily proved, the objection therefore does not import the ſmalleſt doubt of his guilt, or in any way affect or relate to the legal definition of forgery; for it is clear that he knowingly uttered a falſe inſtrument, with an intention to defraud, which is the preciſe offence that the laws againſt forgery aim to ſuppreſs. The propoſition ariſing from this objection is, that the paper writing ſtated in the indictment is not a promiſſory note, becauſe it is not upon a ſtamp; but the queſtion, whether it is or is not a promiſſory note, depends upon the *tenor* of the inſtrument, and not upon the circumſtance of its being ſtamped or not ſtamped. An inſtrument in writing, by which one perſon promiſes to pay to another perſon ſo much money, muſt by force of the words be a promiſſory note, and the paper writing, in the preſent caſe, is an inſtrument preciſely of that deſcription. But admitting it to be a promiſſory note, it is contended that it cannot be given in evidence as ſuch, becauſe it is not ſtamped. It has, however, been determined in the *King*, v. *Hawkſwood*, that a bill of exchange, though not ſtamped, is an inſtrument on which forgery may be charged;

charged; and the reaſon given in that caſe is completely ſatisfactory, namely, that the ſtamp-acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law reſpecting it. *Leach. Cr. Ca.* 3 *edit.* *p.* 392. *Ante* 480.

The ſtamp is not, properly ſpeaking, any part of the inſtrument; it is merely a mark impreſſed on the paper, to denote the payment of a duty; and is merely collateral to the inſtrument itſelf. To conſtitute the crime of forgery, it is not neceſſary that the inſtrument charged to be forged ſhould be ſuch as would be effectual if it were a true and genuine inſtrument; for it has been decided in ſeveral caſes, that to forge the laſt will of a perſon who is not dead, is a capital offence; and yet ſuch an inſtrument never could operate as a will, in contemplation of law, during the life time of the ſuppoſed teſtator. *Rex*, v. *Cogan. Leach's Cr. Ca.* 3 *edit.* 503. *Ante* . *Rex*, v. *Sterling. Leach's Cr. Ca.* 3 *edit.* 117. *Ante* 429. And Vide *the dutcheſs of Kingſton's caſe. Ante* 436.

So alſo in the caſe of JAPHET CROOK, it was determined that forging a leaſe and releaſe of lands is a capital offence, although drawn under circumſtances, which if they had been genuine, would have rendered them ineffectual. 2 *Stra.* 901.

The promiſſory note in the preſent caſe is of this kind. The purpoſe for which ſtamps are ordered to be affixed to various inſtruments, is merely to raiſe a revenue; and as to the ſtatutes enacting, "That no promiſſory note, "bill of exchange, &c. not ſtamped as therein directed, "ſhall be pleaded or given in evidence in any court, or "admitted in any court to be good or available in law or "equity:" the legiſlature thereby meant only to prevent their being given in evidence when they were proceeded upon to recover the value of the money thereby ſecured.

It is certain, that no holder of ſuch an inſtrument as the preſent, could, if it had been genuine, have founded an action upon it, and given it in evidence as a *promiſſory note*; but it is equally certain, that it might have been given in evidence on other occaſions; as for in-

ſtance, if any perſon negotiating it were to be ſued for the penalty inflicted upon the offence of negotiating ſuch an inſtrument unſtamped, there is no doubt but that it might be given in evidence; and this inſtance ſhews moſt clearly, that it was properly received in evidence on the trial of this indictment, notwithſtanding the ſeeming prohibitory words of the ſtatutes. The moſt material point of conſideration in this caſe was, whether it did not differ from *Hawkſwood*'s caſe, in as much as the bill of exchange there might have been afterwards ſtamped, as the law then ſtood, and this promiſſory note as the law now is, could not: but the ſame argument applies to this caſe as was uſed in that; namely, that the ſtamp-acts are revenue laws; that the crime of forgery is a falſe making of any inſtrument with intention to defraud; that the ſtamp-acts do not deſtroy its nature as a promiſſory note, but only prevent a recovery from being had on it; and that if the argument in ſupport of the objection were permitted to prevail, the moſt pernicious conſequences would enſue; for then by a parity of reaſoning, the forging of a note upon paper, whereon there is a ſtamp of leſs value than the law requires, or a bond, or leaſe and releaſe, or any other inſtrument wherein a ſtamp is required, might be practiſed with impunity.

Upon theſe grounds it is, that a majority of the judges are moſt clearly of opinion, that there is no foundation for this objection, and that the conviction is good and valid. *Leach's Cr. Ca.* 3 *edit.* 811.

The caſe of WITHWELL, *and others*, aſſignees, &c. v. DIMSDALE, *and others*, *Niſi Prius*, *Mich.* 33 *Geo.* 3. ſeems to ſhew that lord KENYON was not among the majority of the judges who acceded to the opinion of Mr. juſtice BULLER, in the caſe of *Hawkſwood*. The caſe of *Withwell*, v. *Dimſdale*, was, detinue for the bill of ſale of a ſhip delivered by the bankrupt to the defendants. Amongſt other pleas, the defendants pleaded one, putting the bankruptcy in iſſue.

The plaintiff offered a paper writing, purporting to be an agreement made between the bankrupt and his ſons, by which the former agreed to aſſign his effects to the latter. It was not ſtamped.

Erſkine

Erſkine contended, that though not evidence, of an agreement, yet this paper might be read to prove that the bankrupts were in a failing ſtate, and had an intention of defrauding his creditors, and mentioned a caſe, (probably *Hawkſwood* or *Lee*'s), in which a man was convicted for forging an inſtrument not ſtamped.

Lord KENYON, C. J. ſaid, he was of opinion that this paper writing could not be given in evidence, for *any purpoſe whatſoever*, either to eſtabliſh or defeat it *nor did he agree with the caſe cited* as *to the forgery*. The plaintiff produced other evidence, and obtained a verdict. *Peake's Caſes at N. P.* 167, 168.

CHAPTER VI.

When and how far it is neceſſary to prove the appointments of a public officer, or his authority, by written warrant, and in what caſes it is neceſſary to produce the written authorities under which he acts.

THE rules in this chapter reſult from the great general rule—the beſt evidence the nature of the caſe admits of muſt be given. Vide *Book* 1. *Rule* 1. *p.* 342.

Rule the Firſt.

It is a general rule, that where it is neceſſary to prove that a perſon is in a public office or capacity, it is ſufficient to ſhew that they acted upon the occaſion as officers in their reſpective offices and capacities without producing the written inſtrument by which they were ſeverally appointed.

And therefore in CREW, *qui tam*, *v.* SAUNDERS. *Hilary*, 8 *Geo.* 2. *B. R.* Action, on *ſtat.* 9 *Ann. ca.* 10. *ſec.* 44. for intermeddling at an election, the defendant being a *poſt-maſter*. It was moved, on behalf of the plaintiff, for liberty to inſpect the poſt-office books, and take a copy of the defendant's deputation.

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This was oppoſed on behalf of the poſt-office, they not being a party to the ſuit, on the authority of doctor *Weſt*'s caſe, *Hil.* 12 *Ann.* who was denied liberty to inſpect the books of the college of phyſicians. And *Underhill* v. *Durham*, *Andr.* 247. When the plaintiff was denied inſpection of the books of the dean and chapter, they being no parties, and *Shelling* v. *Farmer*. 1 *Strange*, 646, was alſo cited.

On the other ſide, this caſe was compared to that of *court rolls*, and entries in the cuſtom-houſe, bank, and ſouth-ſea books; but,

The COURT ſaid, that inſpecting court-rolls was the original of theſe motions, but then it was confined to the caſe of perſons intereſted, the rolls being the common evidence, which of neceſſity muſt be kept in ſome one hand. But lords and tenants of different manors have always been denied as ſtrangers. In the caſe of public companies, it is reſtrained to the entry which concerns the party himſelf: and as to the cuſtom-houſe books, they are really the merchants books for that purpoſe. The conſtitution of the officer is *private*, and therefore not neceſſary for the plaintiff to prove; and as againſt the defendant, his *acting* will be ſufficient. 2 *Strange*, 1005.

So in RADFORD, *quitam*, *v.* M'INTOSH, *Eaſter*, 30 *Geo.* 3. Action on *ſtat.* 27 *Geo.* 3. *ca.* 26. It was held that in an action for penalties on the *Poſt-horſe Act*, brought by the farmer of the tax, it is not neceſſary for the plaintiff to give in evidence his appointment by the lords of the treaſury, or the commiſſioners of the ſtamp-duties authoriſed by them. Proof that the defendant hath accounted with him, *as farmer*, for the duties is ſufficient. 3 *Term. Rep.* 632.

In the ſame caſe lord KENYON, C. J. obſerved, that in penal actions on 2 & 3 *Edw.* 6. *ſec.* 2. which enables the owers of *tithes* to recover double their value in caſe they are withdrawn, it hath always been held ſufficient proof againſt the defendant that the *party ſuing* is in *the act of receiving tithes from him.* 3 *Term Rep.* 635.

BULLER, J. added—It appears that the defendant hath treated with the plaintiff in the character of farmer-general.

general. Then this comes within the claſs of caſes for *non-reſidence*, where it is ſufficient to prove the defendant in poſſeſſion of the church *without* proving preſentation, inſtitution, and induction, as was held in *Bevan, qui tam*, v. *Williams (Eaſt.* 16 *Geo.* 3. *B. R.)* 3 *Term. Rep.* 635.

So in BENYMAN *v.* WISE, *Trinity*, 31 *Geo.* 3. which was an action by an *attorney*, for words ſpoken of him in his profeſſion, the COURT held that the plaintiff need not prove that he is an attorney by his admiſſion, or by a copy of the roll of attornies; for that proof that he acted as an attorney is ſufficient. 4 *Term Rep.* 366.

Rule the Second.

In the caſe of cuſtom-houſe officers, evidence is admitted both in criminal and civil ſuits, to ſhew that the party is a reputed officer. 4 *Term Rep.* 366.

As in the KING *v.* SHELLY. *Old-Bailey*, *July ſeſſions*, 1784. The priſoner was indicted on *ſtat.* 19 *Geo.* 2. *ca.* 34. for puniſhing perſons reſcuing unaccuſtomed goods ſeized as being liable to pay duties, &c. *Iriſh*, 37 *Geo.* 3. *ca.* 30.

The indictment ſtated that the proſecutors were exciſe officers, and that the goods ſeized were unaccuſtomed goods. No evidence was produced to prove theſe averments, but what was to be collected from the teſtimony of the proſecutors themſelves, and it was ſubmitted to the court, by the priſoner's counſel, that theſe averments being facts poſitively alledged, they ought to be poſitively and ſubſtantially proved.

In anſwer to this point, the *ſtat.* 11 *Geo.* 2. *ca.* 30. *ſec.* 32. was cited, by which it is enacted, that exciſe officers acting in the execution of their duty, ſhall be taken to be exciſe officers, until the contrary ſhall be made appear; for that in all caſes the *onus probandi* is thrown upon the priſoner. The point was over-uled. *Leach Cr. Ca.* 2 *edit.* 278. 3 *edit.* 381.

This deciſion is corroborative of what was ſaid by BULLER, J. in BENYMAN *v.* WISE, above cited. That in the caſe of exciſe and cuſtom-houſe officers, even before the *ſtat.* 11 *Geo.* 1. evidence was admitted both in criminal

criminal and civil ſuits to ſhew that the party was a reputed officer. 3 *Term Rep.* 366.

Rule the Third.

In the caſe of peace-officers, juſtices of the peace, conſtables, &c. it is ſufficient to prove that they acted in thoſe characters, without producing their appointment; even in the caſe of murder. 3 *Term Rep.* 366.

In the KING *v.* WINNIFRED and THOMAS GORDON, *ſpring aſſizes, Northampton*, 29 *Geo.* 3. This point was ſolemnly determined.

The priſoner *Thomas Gordon*, a youth, was tried with his mother (who was charged as acceſſary) on an indictment for the felonious and wilful murder of *George Linnel*, he being then and there conſtable of *Patteſhall*, in the county of *Northampton*, and was convicted.

Several points of law were ſubmitted to the court by the priſoners counſel.

THOMPSON, Baron, reſerved theſe queſtions for the opinion of the twelve judges; and the firſt of theſe queſtions was—

Whether that as the indictment alledged that *Linnel*, the deceaſed, was the conſtable of the pariſh, it was not incumbent on the proſecutor to prove that fact by ſhewing that he had been duly elected into office?

Theſe points were argued in the Exchequer-chamber on Wedneſday the twenty-fourth of June, 1782.—*Galley*, for the priſoners; *Dayrell*, for the crown.

HOTHAM, Baron, *at the ſummer aſſizes, held for the county of Northampton*, 1789, informed *Thomas Gordon* that the judges were of opinion that the caſe was fully proved againſt him, and he was executed. *Leach's Cr. Ca.* 2 *edit.* 412. 3 *edit.* 581 *to* 586.

Rule the Fourth.

If an officer to whom a warrant is directed be killed in attempting to make the arreſt, it is murder, though it ſhould appear upon evidence that the warrant is irregular or illegal.

The

The illuſtration of the above rule appears in the KING, *v.* the INHABITANTS of WINWICHE, *Banco Regis*, 40 *Geo.* 3.

A magiſtrate, who kept by him a number of *blank warrants, ready ſigned*, (by another juſtice) on being applied to, filled up one of thoſe, and ſigned and delivered it to the officer, who, on endeavouring to arreſt the party, was killed; the judges were of opinion, that this was murder in the perſon killing the officer, and he was accordingly executed. And ſays lord KENYON, C. J. who cited the caſe, this was not a new principle then for the firſt time eſtabliſhed, it has always been uniformly acted upon. 7 *Term. Rep.* 455.

NOTE. For though a juſtice of the peace cannot grant, and of courſe cannot juſtify the granting a blank, or any other irregular or illegal warrant, yet the *officer*, who acts merely miniſterially, is juſtifiable in executing any ſuch warrant delivered to him by a magiſtrate, for any felony, or miſdemeanor, within the magiſtrate's juriſdiction; and therefore the killing an officer acting under, and by direction of ſuch warrant, is murder, and of courſe the evidence of an arreſt by ſuch illegal warrant is no juſtification for the priſoner. Vide 2 *Hawk. Pl. Cr. ca.* 13. 7 *edit. vol.* 4. 172.

Rule the Fifth.

On the execution of a civil proceſs, the breaking of the outward door is illegal, and the officer muſt produce in evidence, not only the *warrants* but the *writs*, under the authority of which he acted, otherwiſe if he be killed, the offence will only amount to manſlaughter.

As in the KING, *v.* DANIEL TAYLOR, *Maidſtone, lent aſſizes*, 1767, before HEATH, J. The defendant was indicted on the *Black-act, ſtat.* 9 *Geo.* 1. *ca.* 22. *ſect.* 1. for maliciouſly ſhooting at one *Beer*, a ſheriff's officer. It appeared in evidence, that the priſoner had mortgaged a houſe to *Harvey*, that judgment in ejectment had iſſued, and the mortgagee had executed a writ of poſſeſſion. The writ of poſſeſſion being oppoſed, the mortgagee iſſued proceſs to hold the priſoner to bail for the mortgage money,

and employed *Beer* to arreſt him. The priſoner being in the houſe, of which he had obtained *forcible poſſeſſion; Beer*, with *Harvey* and other aſſiſtants, broke open the outward door, went up ſtairs, and found the priſoner on the landing-place armed with a loaded gun. They informed him that they came to arreſt him, to which he anſwered, that he would not be taken, and, if they attempted to arreſt him, he would ſhoot them, upon which they retired to the outward door followed by him, pointing the gun at them. Further aſſiſtance was ſent for and came, whereupon the priſoner diſcharged his gun at *Beer*, and ſhot the contents through his hat, whereupon, with difficulty, he was taken.

After proving thoſe particulars, *evidence* was alſo given of the time of iſſuing the writ of poſſeſſion, the delivery of the warrant thereon to *Beer* the officer; and that purſuant thereof, he had given poſſeſſion to *Harvey*'s attorney, who was duly authorized to receive it, by letter of attorney from *Harvey*, and that ſuch attorney had afterwards delivered the key of the houſe to a third perſon, to keep poſſeſſion for *Harvey*. Such third perſon being called upon, gave in evidence that he had been in poſſeſſion of the key ever ſince it had been delivered to him, but that he had heard that the priſoner had broken into the houſe again.

Next were proved, that the writ of *capias*, to arreſt the priſoner for the mortgage money, *had iſſued*, and the delivery of the warrant thereon to *Beer*, in order to arreſt the priſoner; and it further appeared in evidence on theſe particulars, that the *writs* themſelves are *never delivered to the officers*, but are *filed in the ſheriff's office*, and that therefore the proſecutor had them not to produce on the trial; and it alſo appeared that *Beer* and his aſſiſtants, at the ſaid time of breaking open the door to arreſt the priſoner, had with them the warrants on the writs of poſſeſſion and *capias*, but not the *writs themſelves*.

The priſoner's counſel inſiſted, that the *writs themſelves* ought to be ſhewn in evidence, to prove that warrants, under which the parties had acted, had legally iſſued, in order to juſtify the forcible entry of the bailiff and his aſſiſtants, either to retake the poſſeſſion or to arreſt

arreſt the priſoner; and that although the warrants might be ſufficient evidence upon queſtions between the ſheriff and his bailiff, yet as between *them* and the *public* the writs muſt appear to have regularly iſſued, from the production of them in evidence, though the bailiff need not have them with him at the time of the execution thereof.

HEATH, J. To intitle you to break open the houſe, you ſhould have gone to a *juſtice of the peace*; for though the priſoner had made a forcible entry upon *Harvey*, the bailiff had no right to make a forcible entry on him without a *warrant* from a *juſtice*. There would be no end elſe, but perpetual warfare in ſociety. Indeed it ſeems too much to convict the priſoner on this *ſtatute*, for the breaking of the houſe, by *Beer* and his aſſiſtants, was clearly illegal. The charge is, that he *maliciouſly*, &c. ſhot at *Beer*, having a warrant to arreſt him, and though the priſoner got into the houſe by force, yet being in actual poſſeſſion at the time, had he killed *Beer* in this illegal attempt to arreſt him, he would have been guilty of *manſlaughter* only. And as to the *writs of poſſeſſion* and *capias*, his lordſhip ſeemed to think, that they ought to have been produced in evidence as well as the warrants. *Stubb's Cr. Cir.* 7 *edit.* 371.

THE

RULES OF EVIDENCE

ON

Pleas of the Crown,

ILLUSTRATED.

BOOK IV.

ON EVIDENCE NECESSARY TO MAINTAIN AN INDICTMENT, AND EVIDENCE APPLICABLE TO GENERAL ISSUES IN PLEAS OF THE CROWN.

CHAPTER I.

On the application of Evidence given to ſupport an indictment on a ſtatute, when that evidence fails in ſupporting the charge under the ſtatute, but is ſufficient to ſupport the ſame charge at common law.

Rule the Firſt.

It was formerly generally taken, that no indictment grounded on a ſtatute, and which concludes *contra formam ſtatuti*, and cannot be made good, by the ſtatute, can be maintained as an indictment of an offence at common law. 2 *Hawk, P. L. ca.* 35. *ca.* 46. 7 *edit. vol.* 4. 70, *and* 450.

The

The chief reaſon is, that the proſecution is intended to be grounded on a foundation which will not ſupport it. *Ibid.*

HALE, in ſupport of the old rule, ſays, an indictment grounded upon an offence made by act of parliament muſt by expreſs words bring the offence within the ſubſtantial deſcription made in the act of parliament, and thoſe circumſtances mentioned in the ſtatute to make up the offence, ſhall not be ſupplied by the general concluſion, *contra formam ſtatuti.* And ſuch indictment ſhall be quaſhed, and the party ſhall not be put to anſwer it. *Hale, P. C.* 170, 171.

As in PENHALLO's caſe, *Eaſt.* 33 *Eliz. B. R.* indicted upon the 5 *Edw.* 6. for drawing his dagger in the church of *B.* againſt *I. S.* and doth not ſay, (according to the ſtatute) "*to the intent to ſtrike him,*" and for this cauſe it was void. But then it was moved, if this were not good, as for an aſſault, he might be fined upon it. But *per* CURIAM it is void in all; for being indicted upon the ſtatute, it is void as to an offence at the common law. *Cro. Eliz.* 231. The *Queen* v. *Hall, and others, Cro. Eliz.* 307. *Eden's ca. Cro. Eliz.* 697. *Cholmley's caſe. Cro. Car.* 465. *Bennet* v. *Talbot.* 1 *Salk.* 212.

From theſe caſes it appears, that though the *evidence* given would ſupport an indictment at common law, yet if the indictment concluded againſt the ſtatute the defendant was acquitted and diſcharged, as if the whole proceeding had been *coram non judice.*

Rule the Second.

Where a perſon is indicted upon a *ſtatute*, and the *evidence* doth not bring the caſe within the ſtatute, but yet *proves* the offence charged in the indictment, as it is an offence at the *common law*, the defendant may be found guilty at the common law, and the words *contra formam ſtatuti* may be rejected as ſurplus. *Hawk. P. C. ca.* 25 *and* 46. 7 *edit. vol.* 4, 450.

So in PAGE's caſe, it was reſolved, that if perſons be indicted ſpecially of the ſtatute of ſtabbing, and the *evidence* be not ſufficient to bring them within the ſtatute, they

they may be found guilty of man-ſlaughter at common law; and the words *contra formam ſtatuti* ſhall be rejected as ſenſeleſs where the offence is prohibited by the common law only. *Ibid. Siderf.* 420. 2 *Keb.* 128. *The King v. Smith. Dougl.* 445.

And in the KING *v.* MATTHEWS. *Hil.* 33 *Geo.* 3. *B. R.* Indictment for an offence at common law, concluded *contra formam ſtatuti.*

Gibbs moved an arreſt of judgment; and aſſigned, as one cauſe of error in the record, "becauſe the offence "is laid to be *againſt the form of the ſtatute,*" and it is only an offence at common law, and cited *Cholmley's* caſe, *Cro. Car.* 465.

The COURT ſaid there was no foundation for the objection. It had been frequently over-ruled and determined, that the words "*againſt the form of the ſtatute,*" might be objected as ſurpluſage. 5 *Term. Rep. B. R.* 169. *In the King v. Bathurſt, Sayer* 225, *and in the King v. Kettleworth, Eaſt.* 32 *Geo.* 3. *B. R. the court ruled the point as above.*

NOTE—*Cholmley's* caſe, cited in the above caſe by *Gibbs*, was for an aſſault in a church, againſt the ſtatute. The objection was, that the indictment is *contra formam ſtatuti*; and this offence is not puniſhable by the ſtatute, unleſs that he ſmote with a weapon, or drew a weapon in the church or church-yard, or drew a weapon to that intent; and by the ſecond clauſe in the ſtatute for ſmiting or laying violent hands, it is excommunication, *ipſo facto*; and it is not mentioned here how he ſtruck—and therefore the JUSTICES *doubted. Cro. Car.* 465. *Ante* 494.

CHAPTER

CHAPTER II.

How far the Evidence given againſt a defendant on his trial, as principal, can affect him, where the facts ſhew him to be acceſſary.

Rule.

A DEFENDANT cannot be found guilty on an indictment againſt him as *principal*, which only proves him to have been *acceſſary* before the fact: but he, on ſuch evidence, ſhall be diſcharged from the indictment. *Hawk. P. C. ca.* 35, *and* 46. 7 *edit. vol.* 4. *p.* 319. 450. Vide *Ante* 463, 464.

CHAPTER III.

As to the certainty of the Day laid in the Indictment.

Rule the Firſt.

IN *all* caſes, the day laid in the indictment or appeal is *not* material upon *evidence*; but the defendant may be convicted upon proof of a fact at any other time whether *before* or *after* the day laid, ſo that it be *before* the time when the indictment or appeal was preferred. 2 *Hawk, P. C. ca.* 46.

COKE and HALE ſupport this rule. They ſay, if a man be indicted for felony or treaſon, ſuppoſe the 31*ſt of April*, 24 *Car.* and in truth the offence was committed 1*ſt June*, 24 *Car.* yet he ſhall be convicted notwithſtanding the *variance*, for the day is not material. Yet danger and trouble may enſue by the relation of ſuch attainder to the day mentioned in the indictment; therefore the jury ſhould *find* the *true* day. 2 *Inſt.* 318. 3 *Inſt.* 230. 1 *Hale. P. C.* 361. 2 *Hale, P. C.* 179.

So

So in the KING *v.* ſir HENRY VANE. *Trinity*, 14 *Car.* 2. *anno* 1662, indicted for high treaſon. Although the treaſon for compaſſing the king's death was laid in the indictment to be the 30 *May*, 11 *Car.* 2. Yet upon the *evidence* it appeared that ſir *Henry Vane*, the very day the late king was murdered, did ſit in council for the ordering of the forces of the nation againſt the king that now is, and ſo continued all along, until a little before the king's coming in. It was reſolved that the day laid in the indictment is not material, and the jury are not bound to find him guilty *that day*; but many find the treaſon to be, as it was in truth, either before or after the indictment, as it is reſolved in *Syer*'s caſe, 3 *Inſt.* 230. And accordingly, in this caſe, the jury found ſir *Henry Vane* guilty on the 30th of *January*, 1 *Car.* 2, which was the day the late king was murdered; and ſo all his forfeitures relate to that time, to avoid all conveyances and ſettlements made by him. *Kelyng*, 16. 2 *St. Tr.* 435.

The QUEEN *v.* SYER, (cited above) is curious. The defendant was indicted at a *ſeſſions of the peace* for the county of *Norwich*, at *Norfolk*, 32 *Eliz.* The indictment was for burglary laid to be committed, 1 *Auguſti*, 31 *Eliz.* whereunto *Syer* pleaded not guilty.

Upon the *evidence* it appeared that the burglary was committed 31 *September*, 31 *Eliz.* ſo as at the time alledged in the indictment there was no burglary done; and it was conceived that the very true day was neceſſary to be ſet down in the indictment; for that the judgment doth relate to the day in the indictment, and ſo avow feoffments, leaſes, &c. for that (as it was alſo conceived) the feoffee, leſſee, &c. when the attainder is upon a verdict, ſhould not falſify the time of the felony; and thereupon the jury found *Syer* not guilty.

At the ſame ſeſſions *Syer* was again indicted for the ſame burglary, done 1 *Sept.* 31 *Eliz.* when in truth it was done. And he that gave the charge at ſeſſions doubted whether upon this matter *Syer* might not plead *auter foitz acquit* for the ſame burglary, (for ſeeing the offender is allowed no counſel, the court ought to do him juſtice and aſſign him counſel *in favorem vitæ*, though

he demand it not, to plead any matter of law appearing to the court for his diſcharge) and therefore he ſtayed the proceedings againſt him, and the aſſizes being at hand, he acquainted the juſtices of aſſize with this caſe, and with the doubts conceived thereupon.

WRAY, C. J. and PERRYANE, J. anſwered him, that the like caſe had been lately propounded by *Perryane*, J. to all the juſtices of England, and by them three points were reſolved: *Firſt*, That the crown was not bound to ſet down the very day when the treaſon, felony, &c. was done; but the day ſet down in the indictment, being before or after the offence done, the jury ought to find him guilty, if the truth of the caſe be ſo; and if it be alledged before the offence done, to find the day when it was done in *rei veritate*, for they are ſworn *ad veritatem dicendam*, and then the forfeiture ſhall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment. *Secondly*, That if the triers found the offender guilty generally, yet the feoffee, or leſſee, &c. if the offence be alledged in the indictment before it was yet done, to their prejudice, may falſify in the *time*, but *not* in the *offence*. For ſeeing the crown is not bound to ſet down the very juſt day when the treaſon or felony, &c. is done, and that the triers have chief regard and reſpect of the offence itſelf, GOD forbid but that the ſubject might falſify as concerning the time of the offence. *Thirdly*, If the offender be found not guilty, he in that caſe might plead upon a new indictment *auter foitz acquit*, and ſo *Syer* in the caſe aforeſaid did, and was thereupon diſcharged. 3 *Inſt.* 230.

Rule the Second.

Evidence may be given of a treaſonable conſpiracy, &c. at any time before or after the time alledged in the indictment; and at any place.

So reſolved in the KING, *v.* ROBERT CHARNOCK, and others, *Old-Bailey ſeſſions*, 8 *Will.* 3. before HOLT, C. J. when the following reaſons were aſſigned.

Firſt,

Firſt, Becauſe it is only a circumſtance and of form; ſome day muſt be alledged, but the preciſe day is not material.

Secondly, The indictment lays it at divers days and times, as well *before* as *after*, and thereby comprehends what was done *laſt* year as well as *this*; and as the evidence may be of matters *before* that time, ſo it may be of matters alſo at any time after the time ſpecified in the indictment, provided it be not after the time the indictment was found; neither is the evidence upon *place*, for it may be of *any* place, provided it be not out of the county. 1 *Salk.* 288. 4 *St. Tr.* 554, 570, 596. Vide *ca. on Conſpiracy, Poſt* .

Rule the Third.

The *ſtat.* 7 *Will.* 3. *ca.* 3. *(Engliſh)* makes no exception to the antecedent rules.

As in the KING, *v.* FRANCIS TOWNLY, *commiſ. oyer and terminer, &c. St. Margaret's-hill, Surrey*, 20 *Geo.* 2. Indicted for high treaſon, in levying war, &c.

His counſel inſiſted that the overt-acts are charged in the indictment to have been committed on the 10*th day of October*, and that all the *evidence* is of overt-acts *ſubſequent* to that time. That however the reſolutions with regard to the points may have been before *ſtat.* 7 *Will.* 3. *ca.* 3. (as in *Charnock's* caſe) yet now by that act, no evidence is to be given but of overt-acts laid in the indictment; and, conſequently the overt-acts muſt be proved in ſuch manner as laid in the indictment. That in this caſe eſpecially, the king's counſel are not at liberty to *vary* in their proofs from the *day laid*, ſince they have confined themſelves in the indictment to *one* day, and have not charged, as in moſt of the precedents is charged, that the defendant did commit the treaſon charged on him on the day laid, and divers days and times, as well before as after.

The *ſolicitor-general (Murray*, after earl MANSFIELD, C. J. *B. R.)* anſwered, that the 7 *Will.* 3. makes no alteration in regard to this point, ſo as to make either *time* or *place* more material than they were before the act;

the act, indeed, ſaith that no evidence ſhall be given of any overt-acts not laid in the indictment. But what is, or is not evidence of ſuch overt-acts, is left upon juſt the ſame foot in this reſpect as before the act; what was evidence at common law is, in this reſpect evidence ſtill; and as to the charging the overt-acts, and divers days and times, as well before as after the day particularly mentioned, the greateſt part of the precedents he had ſeen for levying war, which is the preſent caſe, do charge the overt-acts on *one* day only.

The COURT over-ruled the objection. *Townly's caſe. Foſt.* 7. 11 *St. Tr.* 543.

Rule the Fourth.

Where the time *proved* varies from that *laid* in the indictment or appeal, the jury may either find the priſoner guilty generally, in which caſe the forfeiture ſhall relate to the time laid, until the verdict be falſified by the party intereſted, as it may be in this reſpect, though not as to the point of the offence, or they may ſpecially find him guilty on the day on which the fact is proved, whether before or after the day laid in the indictment or appeal, in which caſe the forfeiture ſhall relate to the day ſo ſpecially found. 2 *Hawk. P. C. ca.* 46. *Summ.* 264, 270. *Syer's caſe.* 3 *Inſt.* 230. *Ante* 496. *Kely.* 16. Sir *Henry Vane's caſe.* 2 *St. Tr.* 435. *Ante* 497.

But where a verdict *expreſsly* finds a defendant guilty, before the time laid in the indictment or appeal, whether it may be falſified as to the time, by the party intereſted, as it may be, where it finds him guilty generally of the offence in the indictment or appeal, upon *evidence* of a fact *after* the time laid, may (ſaith *Hawkins*) be deſerved to be conſidered. 2 *Hawk. P. C. ca.* 46.

On the trial of lord BALMERINO, *before the lords*, 20 *Geo.* 2. 1746, for high treaſon. The priſoner, who had no counſel, ſaid, "Obſerve, that none of the witneſſes have agreed upon the day charged in the indictment; and I have nothing elſe to ſay." This objection he afterwards explained to mean, that "it was not

"proved

" proved that he was actually at Carliſle when it was " taken by the rebels."

The LORDS inquired of the JUDGES, " Whether it is " neceſſary, that an overt-act of high treaſon ſhould be " proved to have been committed on the *particular day*, " laid in the indictment?"

LEE, C. J. anſwered, " We are all of opinion, that it " is *not* neceſſary to prove the overt-act to be committed " on the particular day laid in the indictment. But as " evidence may be given of an overt-act *before* the day, " ſo it may be *after* the day ſpecified in the indictment; " for the day laid is circumſtance and form only, and " not material in point of *proof*: and this is the known " conſtant courſe of proceedings in trials." 9 *St. Tr.* 606. *Foſt.* 9.

CHAPTER IV.

Of proving the certainty of the Place laid in the Indictment.

Rule the Firſt.

WHERE a *place certain* is made part of the deſcription of the fact charged in the indictment againſt the defendant, the leaſt *variance* as to ſuch place, between the evidence and the indictment is fatal. 2 *Hawk. P. C. ca.* 46. 7 *edit. vol.* 4. 451.

As if a treſpaſs for taking away goods is alledged, in ſuch a pariſh, in a play-houſe in *Lincoln's-inn-fields*, and in evidence it appears to have been done at a houſe of a *different* perſon; or that there is *no* play-houſe in *Lincoln's-inn-fields*, 2 *Hawk. P. C. ca.* 46. *Fielding's Pen. Law*, 317.

As in the KING *v.* DURORE, *Old-Bailey*, *December ſeſſion*, 1784. *L. H. S. Durore*, Eſq; was indicted before HOTHAM, B. on the *ſtatute* 9 *Geo.* 1. *c.* 22. for maliciouſly ſhooting at *Henry Sandon*, in the dwelling-houſe of *James Brewer*

Brewer and *John Sandy*: but it appeared upon *evidence*, that the dwelling-houſe belonged to *John Brewer* and *James Sandy*.

COURT. This is a fatal variance. The proſecutor hath thought proper to ſtate the names of the owners of the houſe, where the fact is charged to have been committed; perhaps this averment was not neceſſary to the validity of the indictment, for the ſtatute ſays, "who "ſhall malicioufly ſhoot at any perſon, in any dwelling-"houſe, or *other place*," but having averred that it was in the dwelling-houſe of *John Brewer* and *James Sandy*, the proſecutor is bound to prove it as it is laid. Now the evidence is, that *Brewer*'s chriſtian name is not *John* but *James*, and that *Sandy*'s chriſtian name is not *James* but *John*, and when a man is charged with a capital offence, every ſtrictneſs which the law requires muſt be attended to. The priſoner was acquitted. *Leach's Cr. Ca.* 2 *edit.* 282. 3 *Edit.* 390. *MS.*

So in the KING *v.* WHITE, *Old-Bailey ſeſſion*, 1783, before BULLER and GROSE, J's. The priſoner was indicted for burglary in the dwelling-houſe of *John Snoxall*, and ſtealing therein goods the property of *Anne Locke*. It appeared in evidence, that the houſe was not the dwelling-houſe of *John Snoxall*.

The COURT therefore held, that the priſoner could not be found guilty either of the burglary or ſtealing in the dwelling-houſe, to the value of forty ſhillings, under *ſtat.* 12 *Ann. ca.* 7. for it is eſſential in both caſes, to ſtate in the indictment the name of the perſon in whoſe houſe the offence is committed, and truly to prove that *averment* on the trial. *Leach's Cr. Ca.* 2 *edit.* 216. 3 *edit.* 286. *MS.*

In the KING, *v.* WILLIAM WOODWARD, *Old-Bailey ſeſſ. October* 1785. The defendant was indicted for ſtealing in the dwelling-houſe of *Sarah Lunnes*. It appeared in evidence, that her name was *Sarah Lunden*.

ADAIR, Recorder, held the variance fatal to the capital part of the indictment. *Leach's Cr. Ca.* 216.

Rule

Rule the Second.

But a *place* laid only for a *venue* in an indictment or appeal is no way material upon evidence; but proof of the ſame crime at any *other* place, in the *ſame* county, maintains the indictment or appeal as well as if it had been proved in the very ſame place. 2 *Hawk. P. C. ca.* 46. Vide *Charnock's caſe. Ante* 498.

As in ſir *Henry Vane's* caſe, wherein it was reſolved, that the the treaſon laid in the indictment being the compaſſing the king's death, which was in the county of *Middleſex*, and the levying war being laid as one of the *overt-acts* to be the compaſſing of the king's death, though this levying of war be laid in the indictment to be *in Middleſex*, yet a war levied by him in *Surrey* might be given in evidence: for being *not* laid as the *treaſon*, but only as the *overt-act*, to prove the compaſſing, it is a tranſitory thing which may be proved in another county. But if an indictment be for levying war, and that made the treaſon for which the party is indicted, in that caſe it is local, and muſt be laid in the county where in truth it was. *Kelyng* 15. *Ante* 497.

So in the caſe of JOSEPH CLARKE, indicted in *London* for high treaſon, for coining of money. Upon the evidence it was proved againſt him in *London*, as it ought to be, the indictment being there: but a great deal of more evidence was given againſt him of committing the ſame crime in *Middleſex* and *Eſſex*, which was agreed to be good evidence to ſatisfy a jury. *Kelyng* 33. 2 *Hale, P. C.* 291. 2 *Hawk. P. Cr. ca.* 25. *Cro. Eliz.* 911. *Criſp.* v. *Verral. Yelv.* 12. *Gumons* v. *Hodges.*

Rule the Third.

After a crime hath been *proved* in the county in which it is laid, evidence may be given of other inſtances of the *ſame* crime in *another* county, in order to ſatisfy the jury. 2 *Hawk. P. C. ca.* 46. *Clarke's ca. above cited.*

So ruled in lord PRESTON's caſe by HOLT, C. J. 4 *St. Tr.* 410. and HENSEY's caſe, by earl MANSFIELD, C. J. who ſaid,

ſaid, "as to *locality* of facts, it is certain that ſome *one* overt-act muſt be proved in the county where the indictment is laid: indeed if any one be ſo *proved* in *that* county, it will let in the proof of others in other counties. *Burr.* 646 *to* 650. *Foſt.* 196.

Rule the Fourth.

Where the defendant is indicted for high treaſon in compaſſing the king's death in *one* county, and levying of war in the ſame county, is laid as an overt-act of ſuch treaſon, and proved in the ſame county by one witneſs, the levying of war in *another* county may alſo be proved by another witneſs. 2 *Hawk. P. C. ca.* 46.

So determined in ſir HENRY VANE's caſe. *Trin.* 14 *Ca.* 2. Sir *Henry Vane* was indicted at the King's Bench for compaſſing the death of king *Charles* the Second, and intending to change the kingly government of this nation; and the *overt-acts* which were laid, were, that he with divers other unknown perſons did meet and conſult of the means to deſtroy the king and government, and did take upon him the government of the forces of this nation by ſea and land, and appointed colonels, captains, and officers; and the ſooner to effect his wicked deſign, did actually, in the county of *Middleſex*, levy war.

The priſoner objected that a levying of war in *Surrey* could not be given in evidence to a jury in *Middleſex*.

But the JUDGES reſolved that in this caſe the treaſon laid in the indictment being the compaſſing of the king's death, which was in the county of *Middleſex*, and the *levying of war* being laid only as one of the *overt-acts* to prove the compaſſing of the king's death, though this levying of war be laid in the indictment to be in *Middleſex*, yet a war levied by him in *Surrey* might be given in evidence.

But it was agreed at the ſame time, that if an indictment be for *levying* war and *that* made the treaſon for which the party is indicted, in that caſe the offence charged is *local*, and muſt be laid in the county where in truth it was. *Kelyng* 15.

The

The above determination was ruled to be law in the caſe of *Thomas Theodoſius Deacon*, for high treaſon, 20 *Geo.* 2. In this caſe an objection was taken by the priſoner's counſel, that a fact proved was not committed in *Cumberland*, the county where the venue of all the overt-acts was laid.

ABNEY and FOSTER, Juſtices, held, that it is indeed neceſſary on this indictment that *ſome* overt-act laid be *proved* on the priſoner in *Cumberland*, but that being done, acts of treaſon tending to prove the overt-acts laid, though done in a foreign county, may be given in evidence. 9 *St. Tr.* 558. *Foſt.* 9.

Rule the Fifth.

The levying of war can in no caſe be given in evidence as an overt act in any county in which it is *not* laid, unleſs it tend to prove ſome overt-act that is expreſsly laid. 2 *Hawk. P. Cr. ca.* 46.

CHAPTER V.

Of Evidence which may be given on an Indictment for treaſon, notwithſtanding the ſtat. 7 *Will.* 3. *ſec.* 8.

Rule the Firſt.

NO evidence ſhall be admitted or given of any *overt-act* that is not expreſsly laid in the indictment againſt any perſon or perſons whatſoever. *Engliſh ſtat.* 7 *Will.* 3. *ſec.* 8. *

Rule the Second.

But *circumſtances* not laid in the indictment, may be given in evidence, notwithſtanding the proviſion of the above cited ſtatute. 7 *Will.* 3. *ſec.* 8.

FOSTER, in his reading upon this ſection of the above cited ſtatute ſaith—

* This ſtatute never paſſed in *Ireland*.

In the caſe of AMBROSE ROOKWOOD *in B. R.* 8 *Will.* 3. indicted for compaſſing the death of the king, two of the overt-acts charged were, that he and others met and conſulted the proper means of way-laying the king, and attacking him in his coach; and alſo that they agreed to provide forty men for that purpoſe.

The counſel for the crown offered to give in evidence that the priſoner produced to one of the conſpirators a liſt of the names of a ſmall party which was to join in the attempt, and of which he was to have the command, with his own name at the head of the liſt, as their commander. This evidence was oppoſed by the priſoner's counſel, becauſe the *circumſtance was not charged* in the indictment; and this clauſe of the act was much preſſed.

But the COURT ſaid, that this circumſtance, if proved, amounting to a direct proof of the overt-acts which were laid, *viz.* the meeting and conſulting how to kill the king, and their agreeing to provide forty men for that purpoſe, and falling under the ſame ſpecies of treaſon, was very proper to be given in evidence. 4 *St. Tr.* 661. *Foſt.* 245.

In major LOWICK's caſe, *Old-Bailey*, 8 *Will.* 3. the COURT alſo declared, that if the circumſtances of providing forty men had not been laid, it might, notwithſtanding, have been given in evidence; for it was a direct proof of the firſt overt-act, *viz.* the meeting and conſulting the proper means to kill the king. 4 *St. Tr.* 718. *Foſt.* 245.

Same rule in the KING *v.* CHRISTOHER LAYER, *B. R.* 9 *Geo.* 1. His correſponding with the pretender, though *not* laid, and though made treaſon by *ſtat.* 12 & 13 *Will.* 3. *Iriſh.* 2 *Geo.* 1. *ca.* 4. *ſec.* 2. 4 *Stat. at large* 322. 19 *Geo.* 2. *ca.* 1. 6 *Stat. at large* 695, was given in evidence, for it directly tended to prove one overt-act that was laid, *viz.* his conſpiring to depoſe the king, and to place the pretender on the throne.

And this rule was adhered to in Sir JOHN WEDDERBURN's caſe, 19 *Geo.* 2. The overt-acts were laid at *Aberdeen*, in the ſhire of *Aberdeen*. It was proved by two witneſſes that the priſoner was with the rebels at *Aberdeen*,

deen, and by thoſe and other witneſſes that he was at divers other places with them.

The king's counſel called witneſſes who proved likewiſe that he was appointed by the pretender's ſon collector of the exciſe; and that he did actually collect the aſſize in ſeveral places where the rebel army lay, by virtue of that appointment, for the uſe of the rebel army.

The priſoner's counſel inſiſted that this evidence ought not to be admitted; for though collecting money for the ſervice of the rebels is an overt-act, yet it not being laid in the indictment, no evidence ought to be given of it; and they relied on the ſtatute of 7 *Will.* 3. but in this they were over-ruled, upon the reaſons before given in the caſe of *Deacon*. 9 *St. Tr.* 580. *Foſt.* 22. *Ante* 505.

In VAUGHAN'S *caſe, admiralty Seſſions, Old-Bailey, before* HOLT, C. J. &c. 8 *Will.* 3. it was adjudged in the conſtruction of *ſtat.* 7 *Will.* 3. that where a man is indicted for high treaſon in adhering to the king's enemies; and certain acts of hoſtility done by him in a certain ſhip called the *Clencarty*, are laid as the overt-acts of ſuch adherence, no evidence can be given of any other diſtinct act of adherence, having no relation to, nor any way tending to prove what was done in the *Clencarty*, though it conduce to prove the ſame ſpecies of treaſon; and therefore that on ſuch an indictment no evidence can be given of the priſoner's having run away to the enemy in a cuſtom-houſe boat, &c. 2 *Hawk. P. C. ca.* 46. 5 *St. Tr.* 17. 38.

Rule the Third.

But where one is indicted for high treaſon in compaſſing the king's death, and a *conſult* and *agreement* to aſſaſſinate the king is laid as one of the overt-acts of ſuch treaſon, the defendant's giving about among the conſpirators a liſt of the perſons names who were intended to be employed in the aſſaſſination, may be given in evidence againſt him upon ſuch indictment. 2 *Hawk. P. C. ca.* 46.

So ruled in *Rookwood*'s caſe, becauſe it naturally tends to prove his agreement to the intended aſſaſſination, which

agreement is one of the overt-acts laid in the indictment. See *Rookwood*'s caſe. *Ante* 506.

Rule the Fourth.

Alſo where the writing of ſeveral treaſonable letters is laid as an overt-act of high treaſon, in compaſſing the king's death, and the purport of ſuch letters is only ſet forth in the indictment, without a particular recital or deſcription of any of them, the particular letters making good ſuch charge may be read at the trial. 2 *Hawk. P. C. ca.* 46.

Which rule was laid down in the KING *v.* FRANCIS FRANCIA, a jew, *Old-Bailey, January ſeſſions*, 3 *Geo.* 1. The overt-act was thus laid "And that he the ſaid "*Francis Francia*, did traitorouſly compoſe and write, "and cauſe to be compoſed and written, ſeveral trai- "torous letters, notifying the intention and reſolution of "him the ſaid *Francis Francia*, and the other traitors, to "move and levy war, &c."

The letters to which this overt-act referred, being offered in evidence, the priſoner's counſel objected to the reading of them; ſubmitting, that the charge of the overt-act being general, that he wrote ſeveral treaſonable letters, though the crown might ſupport that allegation, by ſhewing a confeſſion of the fact, of writing ſeveral ſuch letters, or might give evidence in general that he did write ſuch letters, yet they could not produce *particular letters*, becauſe every one of ſuch letters would be an overt-act in itſelf, and they were not laid in the indictment. This objection they grounded on the ſtatutes of treaſon. By the 25 *of Edw.* 3. though the *intention* was the crime, yet that intention muſt be declared by *open act or deed.* And by the ſtatute of *William* 3. nothing ſhall be given in evidence but what is expreſsly laid in the indictment. If it be allowed under a general charge to prove a number of facts, which are not charged particularly in the indictment, the ſecurity of the law will be eluded, and a man will not be able to make a defence, than if it had been laid in general that he had conſpired the death of the king; that it had been laid

and

and that in order thereto he had been guilty of ſeveral treaſonable practices: and *Gregg*'s caſe was mentioned, where the letter was ſet out at large in the indictment. 10 *St. Tr. App. to Hargr.* 77.

But the COURT held, that here was an overt-act laid, and that it was ſufficiently deſcribed, and that is all the ſtatute requires. The act ſays, that no evidence ſhall be given of any overt-act not expreſsly laid in the indictment. None can ſay here is not an overt-act expreſsly laid. If it is expreſsly laid and ſufficiently deſcribed, it is not neceſſary to mention all the evidence that is to prove the overt-act. The intent of the law is no more than that the overt-act ſhould be ſufficiently deſcribed and charged. It is here ſo charged and deſcribed; the deſign and intention of the letters are ſet forth; and they go to prove, that ſuch letters manifeſting ſuch deſign and intention to levy war were written. Here the crime is compaſſing and imagining the death of the king; and the writing and ſending letters to foreigners to excite a war, is the overt-act, and that act is expreſsly laid in the indictment which is ſufficient, without ſetting forth the words of the letters. 6 *St. Tr.* 77.

FOSTER ſaith, that in every indictment for compaſſing and imagining the death of the king, the queen, or their eldeſt ſon and heir; and alſo in every indictment for levying war, or adhering to the king's enemies, an overt-act muſt be alledged and *proved*. For the overt-act is the charge to which the priſoner muſt apply his defence. But it is not neceſſary that the whole detail of the *evidence* intended to be given ſhould be ſet forth; the common law never required this exactneſs, nor doth the ſtatute of king *William* require it. It is ſufficient that the charge be reduced to a reaſonable certainty, ſo that the defendant be apprized of the nature of it, and prepared to give an anſwer to it. *Foſt.* 194.

Yet there are inſtances of indictments where the very words charged as treaſonable have been ſet forth.

CHAPTER

CHAPTER VI.

Of proving the Overt-acts laid in an Indictment for High Treaſon.

Rule the Firſt.

WHERE *ſeveral* overt-acts are laid in an indictment for high treaſon, the *proof* of any one of them maintains the indictment, as much as if every one of them were proved. 2 *Hawk. P. C. ca.* 46.

HALE confirms this rule. He ſaith, that more overt-acts than one may be laid in an indictment for high treaſon, and then the proof of any *one* of them ſo laid, they being in law ſufficient overt-acts, maintains the indictment. 1 *Hale P. C.* 122.

And FOSTER ſays it is now ſettled, that if divers overt-acts be laid, and but one proved, it will be ſufficient to ſupport the charge, and the verdict muſt be for the crown. *Foſt.* 194.

As in the KING *v.* ROBERT LOWICK, *April ſeſſions, Old-Bailey,* 8 *Will.* 3. indicted for high treaſon, in compaſſing and imagining the death of the king; on an objection made by *Mompeſſon* and ſir *Bartholomew Shower*, counſel for the priſoner. 4 *St. Tr.* 718. *Ante* 506.

HOLT, C. J. and the reſt of the court held, that if ſeveral overt-acts be laid, and but one proved, yet the defendant may be found guilty. 4 *St. Tr.* 718.

So in the KING *v.* CHRISTOPHER LAYER, *at bar, B. R. Mich.* 9 *Geo.* 1. 1722, the ſame point was made and over-ruled.

Rule the Second.

From the laſt rule it reſults, that where divers overt-acts are laid, and the indictment in point of form happeneth to be *faulty* with regard to ſome of them, the court will not quaſh it for theſe defects; becauſe that would

would deprive the crown of the opportunity of *proving* the overt-acts, which are well laid. *Foſt.* 194.

So determined in the KING *v.* LOWICK, in which the objection was argued very much at large by the priſoner's counſel, and mooted by the bench; but

HOLT, C. J. with the unanimous conſent of the other judges, declared that if an overt-act be badly laid, yet it may be given in evidence to ſupport an overt-act well laid, for if it were not laid at all, the fact may be given in evidence. 4 *St. Tr.* 417.

CHAPTER VII.

Of variance between the Evidence given, and the matter ſet forth on the Record.

Rule the Firſt.

WHERE an indictment is for writing a libel *ſecundem tenorem ſequentem*; or for forging a deed ſo and ſo deſcribed, any, the leaſt variance, between the libel recited, or the deed deſcribed, and thoſe given in evidence is fatal. 2 *Hawk. P. C.* 46. 7 *edit. vol.* 4. 453.

Rule the Second.

But where the *ſubſtance* only of a libel is ſet forth it is ſufficient, if the libel be proved to have the ſame ſenſe as is ſet forth. *Ibid.*

In the KING *v.* HALE, *Hilary*, 7 *Geo.* 1. *B.R.* PRATT, C. J. allowed the libel to be read, ſaying he would put it upon the defendant to ſhew that there were material variances. 1 *Stra.* 416.

And the practice now is, on indictments for forgery, libels, &c. that the clerk of the crown reads from the record the matter ſet forth in the indictment, while the defendant, his counſel or agent, examine the original paper.

In

In the QUEEN *v.* doctor DRAKE, *Michaelmas*, 5 *Anne*, *B. R.* Information for a libel, in which were contained divers ſcandalous matters, *ſecundum tenorem ſequent'* and in ſetting forth a ſentence of the libel, it was recited with *nor*, inſtead of *not*, but the ſenſe was not altered thereby.

Defendant pleaded not guilty, and this *variance* appeared upon the evidence, on which the jury found a ſpecial verdict.

The COURT held *firſt*, *cujus quidem tenor* imports a true copy. Vide *Regis* 169. 8 *Co.* 78. *Co. Ent.* 508. 2 *Saund.* 121. *In hac quæ ſequitur forma.* 5 *Co.* 53. *Tenor* is a tranſcript, and implies the very ſame.

Secondly, They held that this was not a *tenor*, by reaſon of this variance, for *not* and *nor* are different, different in grammar, different in ſenſe. And,

POWIS, J. held, as to the point where literal omiſſions, &c. would be fatal, that where a *letter* omitted or changed makes another word, it is a fatal variance; otherwiſe where a word continues the ſame. And in the principal caſe, no man would ſwear this to be a true copy.

Thirdly, The COURT held, that there was a difference between words *ſpoken* and words *written*; of the former there could not be a *tenor*, for there was no original to compare them with, as there is of words written, and though there has been attempts to plead a *quorum tenor* of words ſpoken, it has never been allowed, and therefore where one declares for words ſpoken, variance in the omiſſion or addition of a word is not material, and it is ſufficient if ſo many of the words be proved and found as are in themſelves actionable. Sir *John Bruges* v. *Warenford*. *Dyer* 75. *Lady Ratcliffe* v. *Shubley*, *Cro. Eliz.* 224. *Bliſſet* v. *Johnſon*, *Cro. Eliz.* 503.

Otherwiſe in debt upon a bond, for upon *non eſt factum*, the *variance* is *fatal*. 2 *Roll. Abr.* 718.

Fourthly, HOLT, C. J. held, that in pleading there were two ways of deſcribing a libel, or other writing; by the words or by the ſenſe: by the words, if you declare of a libel *cujus tenor ſequitur*, &c. or *quæ ſequitur in his Anglicanus verbis ſequentibus*, you deſcribe it by its particular words, of which each is ſuch a mark, that

if

if you vary you fail in making good their deſcription. *Dyer* 203. *Sir Edw. Waldgrave's caſe.*

If a man bring treſpaſs *quare clauſum fregit*, and ſets forth abuttals and bounds, and fails in proving them he is gone; and yet he needed not to have deſcribed it after that manner. But you may deſcribe it by its ſenſe and meaning. Thus, it is a good information to ſhew, that the defendant made a writing, and therein ſaid ſo and ſo, tranſlating it into Latin, in which caſe exactneſs in the words is not material, becauſe it is deſcribed by the ſenſe and ſubſtance of it. 2 *Salk.* 660, 661. *Hob.* 272.

Rule the Third.

Where the miſrecited word is in itſelf a complete word, though not intelligible with the context, as "*air*" for "*heir*," there the variance is fatal: but not if the mutilated word does not make any other word, as "*abbey*" for "*abby*." Vide *Abeny* v. *Wallace*. *Poſt* 513. The *King* v. *Beach*. *Poſt*. 515. And the *King* v *May*. *Poſt*. 516. Doctor *Drake's caſe*. *Ante* 512.

Rule the Fourth.

In an indictment the words "in *manner* and *form* following, *that is to ſay*," do not bind the party to recite the inſtrument on which the charge is brought, verbatim in the indictment; nor does it render mere formal omiſſions or miſtakes fatal. Vide the *King* v. *Beach*. *Poſt*. 515. The *King* v. *May*. *Poſt*. , Doctor *Drake's caſe*. *Ante* 512.

In WILLIAMS *v.* OGLE, *Hilary*, 4 *Geo.* 2. upon the iſſue of *nul tiel* record, one was *Segrave*, and the other *Seagrave*; and the COURT held it no variance, *quia idem ſonant*.

Qui tamen, where the party has ſomething elſe to go by than the ſound. 2 *Strange* 889.

In ALBERRY *v.* WALLACE, *Hilary*, 5 *Geo.* 3. *B. R.* *Strange* moved to quaſh the writ of error, which deſcribes the ſuit to be between the plaintiff and one *John*

Aleberry, alias dict' *John Aleberry*, of *Waltham-abbey*, and the *alias dict'* is *abby* in the record; one is *bey* and the other is *by*. This *variance* is in the *alias dict'*, where the court has always obliged the party to deſcribe the ſpecialty *literatim*. And in theſe caſes you never go by the ſound, becauſe the party has ſomething elſe to guide him, and if he miſtakes it is not to be imputed to his own negligence. In a plea of miſnomer indeed it is otherwiſe, becauſe there the party has nothing to go by but the ſound.

Mich. 13 *Ann.* the writ was *Crawley*, and the record *Crowley*, 12 *Aſſ. pl.* 2. *Annſly* and *Aneſly*. *Paſch.* 4. *Geo.* 1. *Shartleſs* and *Sharpleſs*. *Bro. Variance* 26. *Baxſter* with an *ſ*, and *Baxter* without an *ſ*, all theſe were held to be fatal variances in the deſcription of a record, and yet no body will ſay they might have been taken advantage of by plea of miſnomer in abatement. And the reaſon of all theſe caſes is what is laid down in doctor *Drake*'s caſe, that in all caſes where the party has any record or ſpecialty by which he may make an exact deſcription, in ſuch caſes the moſt minute variance is fatal. And Mr. Juſtice *Powys*, who held with the exception about *not* and *nor* ſaid, that if the court once gave into the ſolutions of thoſe variances, they would never know where to ſtop; but being once out at ſea, would find it very difficult to ſteer into harbour again.

But this writ of error would have been well enough, if the *alias dict'* had been left out, becauſe it is ſufficient if the record anſwers the deſcription; and though it would contain more, yet that exceſs muſt of neceſſity imply a fulneſs, and if there be a full anſwer to the deſcription, it is as much as is required. But though it would be good in ſuch a caſe, yet though it is not requiſite to inſert the addition, any variance whatſoever, if the party will take upon him to be more than ordinarily particular is fatal; for then the record does not anſwer the deſcription, as it does where the writ of error makes a total omiſſion of the addition.

Sed per curiam, the caſes cited are of variances in the name of the party, which is more conſiderable than the name of his reſidence. Theſe words are both properly uſed, ſome ſpell it *abbey* and ſome ſpell it *abby*, and if there

there be occaſion we take the latter as an abbreviation of the former. *Per curiam*, the record is well removed and the judgment muſt be affirmed. 1 *Stra.* 201, 231, 232. Vide doctor *Drake's ca. Ante* 512.

So in the KING, *v.* BEACH, *Michaelmas*, 18 *Geo.* 3: *B. R.* The defendant had been convicted of perjury in an affidavit. Upon ſhewing cauſe why the judgment ſhould not be arreſted, exception was taken by *Dunning* and *Buller* in ſupport of the rule, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant ſwore that he "*underſtood* and believed, &c." whereas the aſſignment of the perjury in the indictment was, "that he had falſely "ſworn, that he *underſtood* and believed, &c." omitting the letter *ſ*.

It was inſiſted that this being a variance in the material part of the charge, namely, in the aſſignment of the perjury itſelf, was fatal, and could not be cured by verdict, and cited the *Queen* v. *Drake*. 2 *Salk.* 660. *Ante* 513. *Hutton* 56. *Cro. Jac.* 133. 5 *Rep.* 45. 2 *Lord Raym.* 1224.

Lord MANSFIELD. This was an application for a new trial for perjury in an affidavit, upon the ground of a material variance between the affidavit and the indictment, the letter *ſ* being left out in the word underſtood: and it comes before the court after the jury have read it "*underſtood*." We have looked into all the caſes upon this ſubject, ſome of which go to a great degree of nicety indeed, particularly the caſe in *Hutton* 56, ſhaken by the doctrine laid down in 2 *Hawk. ca.* 46. 239. 6 *Edit.* 339. The true diſtinction ſeems to be taken in the caſe of the *Queen* v. *Drake*, 2 *Salk.* 660. which is this, that where the omiſſion or addition of a letter does not change the word, ſo as to make it *another* word, the variance is not material; in criminal proſecutions a defendant is allowed to take advantage of nicer exceptions: but this is a caſe where the matter has been fairly tried, and where the omiſſion of the letter *ſ* certainly does not change the word; therefore the jury were right in reading it underſtood. *Cowper* 229, 230. 2 *Hawk. P. C.*

7 Edit. 453. *Ante rule* 1 *and* 2. *p.* 505. *Dougl.* 193, 194. *The King* v. *May.*

The KING *v.* Hart is in point. At the lent aſſizes for the county of *Worceſter*, 1776, the defendant was tried for forging a bill of exchange, which was ſet forth in the indictment, as follows, that is to ſay:

"No. 215. £. 42 00 00. HULL, *April* 24, 1775. "Two months after date pleaſe to pay to Mr. *Thomas* "*Jones*, or order, the ſum of forty two pounds, value "*received*, and place the ſame to account of

"GEORGE PRINCE"

"Meſſ. *Halliday & Co.* bankers, *London.*"

When the bill was produced in evidence, it appeared that the word "*received*" was ſpelt "*recievd*," and it was objected that this variance was fatal; for although the two words have the *ſame ſound*, yet as the proſecutor had undertaken by the words "as follows, (that is to ſay)," to recite the bill *ſecundum tenorem*, he was bound to do it literally and preciſely.

It was left to the jury to conſider whether they thought the two words imported one and the ſame thing; and they found the priſoner guilty: but the judgment was reſpited for the opinion of the judges.

The JUDGES conceived it to be a proper queſtion for the jury; for conſidering it as an abreviation, yet if it meant only the ſame word as that uſed in the indictment, it would not vitiate.

GOULD, J. ſaid, he conſidered it as the ſame word, only miſ-ſpelt, and that there was not a poſſibility of miſtaking it for any other word in the Engliſh language. *Leach, Cr. Ca.* 2 *edit.* 131. 3 *edit.* 172.

Rule the Fifth.

Where it is undertaken to ſet forth a *public ſtatute*, a miſ-recital on the record is fatal.

So in BOYCE *v.* WHITAKER *Hil.* 19 *Geo.* 3. This was an action on a bail-bond brought by the plaintiff as aſſignee of the ſheriff of *Kent*. The defendant prayed oyer of the

the bond and condition, and ſet forth the condition, which was in the uſual form, and then pleaded, that, "before the making of the writing obligatory aforeſaid," &c. and ſet forth the ſtatute of *Hen.* 6. *c.* 9. and then went on — "which ſaid writing obligatory the ſaid ſheriff took by colour of his office againſt the form of the ſtatute *aforeſaid.*" The act was *miſ-recited*, and earl MANSFIELD ſaid, that if the defendant had unneceſſarily ſet out the act of parliament, he would hold him to half a letter; and BULLER, J. added, that there were many caſes where the word "*aforeſaid*" had been held to tie the party up to an *exact recital*, and the plea here concluded, that the bond was taken "againſt the form of the ſtatute *aforeſaid.*" *Dougl.* 97.

NOTE—*Douglaſs*, in a note to his report of the above caſe ſays, lord MANSFIELD aſked if there was any doubt whether the ſtatute was a public act?

Davenport, as *amicus curiæ*, ſaid it had been doubted, and was therefore always ſet out. It is recited in the caſe of *Lenthall* v. *Cooke*, and alſo in *Dive* v. *Manningham*. *Plow.* 60.

Rule the Sixth.

The COURT can only take notice of *miſ-recitals* of *private* acts of parliament, when *nul tiel record* is pleaded; except as to the commencement, prorogations, and ſeſſions.

REX v. WILDE, *Mich.* 21 *Car.* 2. which was an information under a *private* act of parliament, after verdict for the proſecutor on the plea of "not guilty," a motion was made in arreſt of judgment, becauſe there was a miſtake in ſetting forth the commencement of the parliament. The anſwer given was, that, being a private act, the court could not take notice of the miſtake on that motion, as it did not appear on the record, and that the defendant ought to have pleaded *nul tiel* record, but the court held that they were bound to take notice of the commencement, prorogations, and ſeſſions of parliament. 1 *Lev.* 206. *Dougl. (in notes)* 97. *Platt* v. *Hill.*

v. *Hill.* *Mich.* 10 *Will.* 38. 1 *Lord Raym.* 318. 1 *Salk.* 330.

In TURVILLE *v.* AYNSWORTH. *Mich.* 1 *Geo.* 2. it was determined that a variance in the name of a corporation is fatal. This was an action upon a South-Sea contract, the plaintiff declared it was for ſtock in the company trading *ad mari Auſtrial' vocat* the South-Sea company.

It was inſiſted on at the trial, that *Auſtralis* was the proper word without an *i*, and therefore the *evidence* did not ſupport the declaration: and it was agreed to take a verdict for the plaintiff, and to apply to the court.

After a great debate a new trial was granted; for it was a different corporation; and if the word *Auſtrial'* was to be rejected, it would not do; for then it would be a company trading to all ſeas, whereas they trade to the South-Seas only; and the *Angliæ vocat'*, the South-Sea company will not do where there is a proper Latin word which is not made uſe of. *James Oſborne's ca.* 10 *Co.* 130. 2 *Stra.* 787, 788. 2 *Lord Raym.* 1515.

NOTE—*Douglaſs*, in a note to his report of the *King* v. *May*, puts a query upon the law of the laſt caſe, and ſeems to conſider it over-ruled by the *King* v. *May*, and the *King* v. *Beach*. *Cowp.* 229. *Ante* 515. *Dougl.* 193, 194.

CHAPTER VIII.

Of Evidence to ſupport an Indictment for Words charged to be ſpoken by the Defendant: and how ſuch Indictment is affected by variance.

Rule.

IT is no evidence in a criminal caſe that the defendant ſaid *ſo and ſo*, or, words to the like effect, becauſe the court muſt know the *very words* to judge of their force and effect. 2 *Hawk. ca.* 46.

And

And the reaſon of this rule is, that of words ſpoken there can be no *tenor*, that is tranſcript, for there is no original to compare them with, as there is of words written: and though there have been attempts to plead a tenor of words ſpoken, it has never been allowed. And therefore if a plaintiff declares for words ſpoken a variance in the omiſſion or addition of a word is not material, and it is ſufficient, if ſo many of the words be proved and found as are in themſelves actionable. 12 *Vin. abr.* 68. *pl.* 46.

So in HUSSEY *v.* COOKE, *Eaſter*, 18 *Jac.* 1. In the *Star-Chamber*. The COURT held that if a witneſs depoſe that a defendant did perſuade a juror to appear and do him reaſonable favour, or words *to the like effect*, this is no ſufficient proof in *criminals*, becauſe the court muſt know the very words to judge of their force and effect, *Hob.* 294. *Foſt.* 200. 1 *Hale, P. C.* 111, 115, 323. 3 *Kel.* 14.

HALE, COKE, and FOSTER fully juſtifies the principle of this rule. FOSTER ſays, as to mere words ſuppoſed to be treaſonable, they differ widely from writings in point of real malignity and proper *evidence*. They are always liable to great miſconſtruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I chooſe to adhere to the rule which hath been laid down on more occaſions than one ſince the revolution, that looſe words to any act or deſign are not overt-acts of treaſon. *Foſt.* 200.

KELYNG ſays, I ſee no difference between words *reduced into writing* and words *ſpoken*. FOSTER anſwers, the difference appeareth to me to be very great, and lieth here. Seditious writings are permanent things, and if publiſhed they ſcatter the poiſon far and wide. They are acts of deliberation capable of ſatisfactory *proof*, and not ordinarily liable to miſconſtruction; at leaſt they are ſubmitted to the judgment of the court, naked and undiſguiſed as they come out of the author's hands. *Words* are tranſient and fleeting as the wind, the poiſon they ſcatter is at the worſt confined to the narrow circle of a few hearers; they are frequently the effect

effect of ſudden tranſport, eaſily miſunderſtood, and often miſ-repeated. *Kelyng* 13. *Foſt.* 200.

The ſuppreſſion of a word or ſyllable may change the ſenſe. So the change of an emphaſis. So words ſpoken in exclamation conveying by ſound and geſture ſurpriſe and abhorrence, may be repreſented in evidence as ſpoken blaſphemouſly or ſeditiouſly.

CHAPTER IX.

Of variance between the circumſtances ſet forth in the indictment, and thoſe given in evidence.

Rule the Firſt.

A VARIANCE between an indictment or appeal of death and the evidence, as to the inſtrumental cauſe mentioned in ſuch indictment or appeal, is no ways material, ſo that the party be proved to have died by the ſame kind of death as alledged in the indictment or appeal. 2 *Hawk. P. C. ca.* 46. *Hales P. C.* 291. *Gilb. Evid.* 270. 277.

Rule the Second.

Therefore if one be indicted or appealed for killing another with a *ſword*, and upon evidence it appear that he killed him with a *ſtaff*, *hatchet*, *bill*, or *hook*, or any other weapon with which a wound may be given, he ought to be found guilty; for the *ſubſtance* of the matter is, whether he gave the party a wound of which he died: and it is not material with what weapon he gave it; for the common effectual word is *precuſſit*, though for form ſake it be neceſſary to ſet forth a particular weapon. 2 *Hawk. P. C. ca.* 23. *ca.* 46. *Summ.* 365, 2 *Inſt.* 319.

Rule

Rule the Third.

And on the ſame ground it hath alſo been adjudged that, on an indictment or appeal for poiſoning a man with one kind of poiſon, may be maintained by *evidence* of a different kind of poiſon; for the ſubſtance of the matter is, whether the defendant *did poiſon* the deceaſed or not. 2 *Hawk. P. C. ca.* 46. 3 *Inſt.* 135. 2 *Hale. P. C.* 291.

Rule the Fourth.

Yet *evidence* of poiſoning, burning, or famiſhing, or any other kind of killing wherein no weapon is uſed, will *not* maintain an indictment or appeal of death by killing with a weapon; and evidence of killing with a weapon will not maintain an indictment or appeal of poiſoning, &c. becauſe they are different kinds of deaths. 2 *Hawk. P. C. ca.* 46. 2 *Hale* 291. 2 *Inſt.* 319.

The above rules are fully illuſtrated in two caſes.

Firſt, The KING, *v.* RICHARD WESTON, indicted for murder, *Michaelmas*, 13 *Jac.* 1. The defendant, a yeoman of the tower, and ſervant to ſir *Jervais Elwis*, lieutenant of the tower, and, under the lieutenant, the keeper of ſir *Thomas Overbury*, then priſoner in the tower, was indicted—For that the ſaid *Richard* on the ninth day of May in the eleventh year of *Jac. regis*, in the tower of *London*, gave to the ſaid ſir *Thomas Overbury* poiſon called *roſeacre*, in broth, which he the ſaid ſir *Thomas* received *et ut ide Richard Weſton præfatum Thomas Overbury magis celeriter interficeret et murdraret* 1 *Junii* 11 *Jac. regis ſupradict.* gave to him another poiſon called *white arſenic*, &c. and that 10 *Julii Ann.* 11. *ſuprad* gave him a poiſon called *mercury ſublimatum tarts ut prædict* Thomas Overbury *magis celeriter interficeret et murdraret* and that a perſon unknown, in the preſence of the ſaid *Richard Weſton*, and by his commandment and procurement the 14th September *Ann.* 11. *ſupradict* gave the ſaid ſir Thomas a clyſter mixed with poiſon called mercury ſublimate *ut prædictum Thomam magis celeriter interficeret*

et murdraret. Et prædictus Thomas Overbury de ſeperalibus venenis prædictis et operationibus inde, a prædictis ſeperalibus temporibus, &c. graviter languebat uſque ad 15 diem Septemb. anno. 11. *ſupradicto, quo die dictus Thomas de prædictis ſeperalibus venenis obiit venenatus, &c.* And albeit, it did not appear of which of the ſaid poiſons he died, yet it was reſolved by all the JUDGES of the King's Bench that the indictment was good; for the ſubſtance of the indictment was, whether he was poiſoned or no. And upon the evidence it appeared that *Weſton*, within the time aforeſaid had given unto ſir *Thomas Overbury* divers other poiſons as namely, the powder of diamonds, *cantharides*, *lapis cauſticus*, powder of ſpiders, and *aqua fortis* in a clyſter. And it was reſolved by all the ſaid judges, that albeit theſe ſaid poiſons were not contained in the indictment, yet the evidence of giving them was ſufficient to maintain the indictment; for the ſubſtance of the indictment was whether he were poiſoned or no. But when the cauſe of the murder is laid in the indictment to be by poiſon, no evidence can be given of another cauſe; as by weapon, burning, drowning, or other cauſe, becauſe they be diſtinct and ſeveral cauſes; but if the murder be laid by one kind of weapon, as by a ſword, dagger, &c. it is ſufficient evidence, becauſe they be all under one claſs or cauſe. 3 *Inſt.* 49.

Afterwards *Ann Turner*, *Gervaſe Helwys*, and *Richard Franklin*, a phyſician, (purveyor of the poiſons) were indicted as acceſſories before the fact done, and it was reſolved by all the judges, that either the proofs of the poiſons contained in the indictment, or of any other poiſon were ſufficient to prove them acceſſaries; for the ſubſtance of the indictment againſt them was, whether they did procure *Weſton* to poiſon ſir *Thomas Overbury*.

So in the KING *v.* MACKALLY. *Paſc.* 9. *Jac.* 1. before all the JUDGES of England, it was reſolved, that if a man be indicted, that he with a dagger gave another a mortal wound, upon which he died, and it is proved that he gave the wound with a ſword, rapier, ſtaff, or bill, in that caſe the defendant ought to be found guilty; for the ſubſtance of the matter is, that the party indicted has given him a mortal wound whereof he died, and the circumſtance of the manner of the weapon is not material

material in caſe of indictment; and yet ſuch circumſtance ought not to be omitted, but ſome weapon ought to be mentioned in the indictment. 9 *Co.* 67.

CHAPTER X.

Of Evidence to ſupport an Indictment againſt the Principal in a ſecond degree.

Rule the Firſt.

ANTIENTLY he that ſtruck the ſtroke, whereof the party died, was only the principal, and thoſe that were preſent, aiding and aſſiſting, were but in the nature of acceſſaries, and ſhould not be put on their trial, until he that gave the ſtroke were attaint by outlawry or judgment. 40 *Aſſ.* 25. 40 *Edw.* 2. 42 *ca.* 1 *Hale, P. C.* 437.

But at this day, and long ſince, the law has been taken otherwiſe, and namely, that all that are preſent aiding and aſſiſting are equally principals with him that gave the ſtroke whereof the party died; for though one gave the ſtroke, yet in the interpretation of the law it is the ſtroke of every perſon that was preſent aiding and aſſiſting, and though they are called principals in the ſecond degree, yet they are principals. 1 *Hale, P. C.* 437. *Gyltin's caſe. Plowd.* 97. 100.

FOSTER adds, that in order to render a perſon an accomplice and a principal in felony, he muſt be aiding and abetting, or *ready* to afford aſſiſtance if neceſſary.

Rule the Second.

So when many agree and meet to commit an illegal act, which is perpetrated by one only, all who are preſent and abetting him, or ready to aid him are principals in the *ſecond* degree, and are ouſted of clergy, as well

well as the principal in the firſt degree. 2 *Hawk. P. C.* 46. 6 *edit.* 127. *Poſt. Rule* 8.

But in ſuch caſes the *evidence* that conſtitutes an offender in the *ſecond* degree is matter of *law* upon which the *court*, and not the *jury*, determines. The *King* v. *Royce.* 4 *Burr.* 2076. *Poſt.* 528.

A. B. and *C.* are indicted for killing *I. S.* and that *A.* ſtruck him, and that the others were preſent, procuring, abetting, &c. and upon the evidence it appears that *B.* ſtruck, and that *A.* and *C.* were preſent, &c. In this caſe the indictment is not purſued in the circumſtance, and yet it is ſufficient to maintain the indictment; for the evidence agrees with the effect of the indictment; and ſo the variance from the circumſtance of the indictment is not material, for it ſhall be adjudged in law, the wound (*the ſtroke*) of every one of them, and is as ſtrongly the act of the others as if they all three had held the weapon, &c. and had altogether ſtruck the deceaſed. 9 *Co.* 67. See the principal admitted in *Robert Mary's caſe*, 9 *Co.* 112. *b. and lord Sanchar's caſe for murder.* 9 *Co.* 119. 4 *Co.* 42. *b.* 11 *Co.* 5. *b.* 3 *Inſt.* 138. 1 *Roll. Rep.* 31. 2 *Hale, P. C.* 292.

Plowden agrees with this rule. In his report of certain points ſettled at a ſeſſion held at the town of *Salop*, 1 *Mary* 1. before Bromley, C. J. B. R. Plowden, and others, it was reſolved, that when *many* come to do an act, and *one* only does it, and the others are preſent abetting him or ready to aid him in the fact, they are principals to all intents as much as he that does the fact; for the preſence of the others is a terror to him that is aſſaulted, ſo that he dare not defend himſelf; for if a man ſees his enemy and twenty of his ſervants coming to aſſault him, and they all draw their ſwords and ſurround him, and one only ſtrikes him, ſo that he dies thereof, now the others ſhall with good reaſon be adjudged as great offenders as he that ſtruck him; for if they had not been preſent he might probably have defended himſelf, and ſo have eſcaped: but the number of the others being preſent, and ready to ſtrike him alſo, ſhall be adjudged a great terror to him, ſo as to make him

him loſe his courage, and deſpair of defending himſelf, and by this means they are the occaſion of his death. So that their preſence is the cauſe of terror, and terror is the reaſon that he receives the wounds, and the wounds are the cauſe of his death. And then in as much as both together, *viz.* the wounds and the preſence of the others who gave no wounds at all are adjudged the cauſe of his death, it follows that all of them, *viz.* thoſe that ſtrike, and the reſt that are preſent, are in equal degree and each partakers of the deed of the other. And notwithſtanding there is but one wound given by one only, yet it ſhall be adjudged in law the wound of every one, that is, it ſhall be looked upon as given by him who gave it by himſelf, and given by the reſt, by him, as their miniſter and inſtrument. And it is as much the deed of the others as if they had all jointly holden with their hands the inſtrument with which the wound was given, and as if they had altogether ſtruck the perſon that was killed. So that it cannot be well termed that they that gave the wound are principals in deed, and the others principals in law; but they are all principals indeed, and in the ſame degree. 1 *Plowd. Comm.* 98.

Rule the Third.

Where the indictment is on a ſtatute, the ſame rules apply as where the indictment is at common law.

As in the COAL-HEAVERS caſe. *Old-Bailey, July ſeſſions*, 1768, before PARKER, C. B. ASTON, J. B. R. and GOULD, J. C. B.

John Granger, Daniel Clarke, Richard Cornwall, and four others were indicted on the *black-act*, for that they "with certain guns charged with gun-powder and leaden "bullets, did wilfully and maliciouſly ſhoot at one *John* "*Green* (in his dwelling-houſe) againſt the *ſtatute* and "againſt the peace."

Four of the priſoners were *proved* to have fired at *Green*, through the windows of his houſe; and the marks of a great number of balls were afterwards found in different parts of the room. The other three priſoners were proved to have been *preſent* when the others fired, but

but they were not ſeen to uſe any fire-arms themſelves.

The JURY found all the priſoners guilty; but a queſtion was reſerved for the opinion of the judges, whether thoſe who were only preſent aiding and abetting were involved in the ſame guilt with thoſe who actually fired; the ſtatute upon which the indictment was framed being ſilent as to aiders and abettors.

The JUDGES determined that this offence was a new-created felony, and therefore that it muſt poſſeſs all the incidents which appertain to felony by the rules and principles of the common law. 19 *Hen.* 6. 47. *Staunf.* 44. 3 *Inſt.* 45. 1 *Hale*, 613. 2 *Hawk.* 444. 6 *edit. Foſt.* 354. *Leach. Cr. Ca.* 3 *edit.* 76.

The ſtatute does not merely take away the privilege of clergy from an offence which was before known, but it ordains that thoſe who were before guilty of the thing prohibited by it ſhall be adjudged felons, without benefit of clergy; and therefore, by a neceſſary implication, makes all the procurers and abettors of it principals or acceſſories upon *evidence* of the ſame circumſtances which will make them ſuch in a felony by the common law; and it hath been long ſettled, that, all thoſe who are preſent aiding and abetting when a felony is committed, are principals in the ſecond degree. *Coal-heavers caſe*, *Leach. Cr. Ca.* 3 *edit.* 78.

So in the KING *v.* MIDWINTER and SIMMS. *Glouceſter Lent aſſizes*, 1749. Indicted on *ſtat.* 9 *Geo.* 1. *ca.* 22. for unlawfully, maliciouſly, and felonioufly killing a mare, the property of *James Lenox Dutton*. On *evidence* it appeared that *Simms* held the mare while *Midwinter* with a ſharp hook gave her a mortal wound in the belly, held by all the judges, except *Foſter*, that *Simms* was debarred the benefit of clergy. *Leach. Cr. Ca.* 3 *edit.* 78. 4 *Burr.* 2075.

Rule the Fourth.

In a ſpecial verdict a *jury* are not to find *evidence* but *facts*; the evidence is with the *court*.

Rule

Rule the Fifth.

A ſpecial verdict which only finds that the defendant was *preſent* at the perpetration of the charge laid in the indictment, but does not find any particular act of *force* committed by him, is not ſufficient to warrant the court to decide that there is *evidence* to convict the defendant as a principal in the ſecond degree.

Rule the Sixth.

If a jury expreſsly find that the defendant *encouraged* and *abetted* the principals in the firſt degree in doing the criminal act charged in the indictment, and alſo *how* he abetted and encouraged them, and the particular circumſtances of his doing ſo; and theſe circumſtances amount to evidence of abetting: they are in point of law *evidence* ſufficient to prove him a principal in the ſecond degree.

Rule the Seventh.

And the above rule holds good, though the jury ſhould alſo find that he did *not* uſe any force, or do any act, perſonally; and then the word *aiding* ſhould not be in the ſpecial verdict.

In the KING *v.* MESSENGER, APPLETREE, and others, indicted for high treaſon. *Old-Bailey ſeſſions, June*, 20 *Car.* 2. Special verdicts were found, and the judges reſolved—

Firſt, That where there are acts of *force* found to be actually committed by the defendant in purſuance of the deſign, there is no need to find him to be *aiding* and *aſſiſting*, which is only neceſſary to be found where *preſence* without *force* is found.

Secondly, That a verdict is not full enough for the judges to decide on againſt the defendant where it only finds that he was *preſent*, and finds no particular *force* or that he was *aiding* or *aſſiſting* to the reſt; for it is poſſible one may be preſent amongſt a rabble only out of curioſity to ſee, and whether they were aiding and aſſiſting

is

is matter of fact which ought to be expreſsly found by the jury, and not to be left to the judges upon any colourable implication. *Kelyng*, 77 *to* 79. 2 *St. Tr.* 591.

Theſe rules are alſo illuſtrated in the KING *v.* JOHN ROYCE, *Eaſter*, 7 *Geo.* 3. *B. R.* The defendant was indicted for a capital felony, as a principal in the ſecond degree at a ſpecial commiſſion at *Norwich*, *September*, 6 *Geo.* 3. *on ſtat.* 1 *Geo. ſtat.* 2. *ca.* 5. for feloniouſly beginning to demoliſh and pull down a dwelling-houſe the property of *Robert Marſh*, &c. againſt the ſtatute.

The ſpecial verdict ſtated, that at the time the ſaid perſons *unknown* ſo began to demoliſh the ſaid dwelling-houſe, the ſaid *John Royce* was then and there *preſent*, and did then and there *encourage and abet* the ſaid perſons unknown in beginning to demoliſh and pull down the ſaid dwelling-houſe, by then and there *ſhouting* and uſing *expreſſions to excite* the ſaid perſons ſo to do. But the jury further find that the ſaid *John Royce* did *not* with force begin to demoliſh or pull down, or *do any act* with his own hands or perſon, for that purpoſe, otherwiſe than as aforeſaid.

NOTE—The word "*aiding*" was originally inſerted in the ſpecial verdict, but ſtruck out by *Gould*, J. who tried the cauſe.

The queſtion was whether (upon facts ſtated in the ſpecial verdict, and which of courſe had been given in *evidence* on the trial) he was a principal in the ſecond degree, and as ſuch ouſted of clergy by the ſtatute.

Solicitor General Willes, *pro Rege*, among many other caſes cited the caſe of the *rioters* at *Siſſinghurſt*, in *Kent*, wherein it was determined that thoſe *within* a houſe, if they abetted or counſelled a riot, were in law preſent aiding and aſſiſting, and *principals*, as well as thoſe that *iſſued out* and actually committed the aſſault; for it was but within five rod of the houſe, and in view thereof, and all done as it were in the ſame inſtant. 1 *Hale*, *P. C.* 463.

Upon the preſent finding this man is a principal in the ſecond degree. *Acceſſaries at the fact*, as they were anciently called, are now conſidered as principals in the ſecond

ſecond degree. Theſe are defined 1 *Hale, P. C.* 437, 616. *Foſter.* 350. *Ante* 527.

This man was abetting and ready to afford aſſiſtance. The negative part of the finding only ſhews that he was not a principal in the *firſt* degree. Enough is found to ſhew that he was ſo in the *ſecond*. For though aiders and abettors are not particularly named in this act of parliament, yet there is enough in it to ſhew that they were *meant* to be included in it, and the benefit of clergy is taken from them by it "the offenders therein ſhall be "adjudged felons, and ſhall ſuffer death as in caſe of "felony, without benefit of clergy."

Wallace, for the defendant, urged—*Firſt*, that this ſtatute is reſtrained to thoſe who actually commit the felony. *Secondly*, that this finding does now draw the defendant within the deſcription of a principal felon in the ſecond degree. And he cited *Hale*, who lays it down that where any ſtatute ſubſequent to 25 *Edw.* 3. *ca.* 4. hath ouſted clergy; in any of thoſe felonies, it is only ſo far ouſted, and only in ſuch caſes and to ſuch perſons as are expreſsly compriſed within ſuch ſtatutes; for, *in favorem vitæ et privilegii clericalis* ſuch ſtatutes are conſtrued literally and ſtrictly. 2 *Hale: P. C.* 335.

Now this man did not actually *aſſiſt*; he only encouraged by expreſſions to incite. It does not appear even that he was *ready* to aſſiſt them in *act*: and it is found negatively that he did *not* do any act, &c. with his own hands or perſon.

Lord MANSFIELD recommended inquiry to be made for precedents of caſes where the word "*aiding*" was *omitted* in a ſpecial verdict. He obſerved, the word "*aiding*" does not neceſſarily imply that the perſon *actually did* any thing. The mere *preſence* may be an aiding, as in taking prizes at ſea. The number of perſons preſent and inciting *deters* others from oppoſing; though the perſons preſent and inciting may not do any particular and perſonal act themſelves.

Lord MANSFIELD ſaid, there was no doubt but that principals in the firſt and principals in the *ſecond* degree were all equally *felons without benefit of clergy*.

The act says: "every such demolishing, or pulling "down, or beginning to demolish or pull down, shall "be adjudged *felony without benefit of clergy*; and the of- "fenders therein shall be adjudged felons, and shall suf- "fer death as in cases of felony, without benefit of "clergy."

But it leaves the *evidence* to *law*, and by *law* they are all equally actors.

The being principal in the *first*, or principal in the *second* degree relates to the priority of trial.

So there is no doubt on the act but that all are guilty, the aiders as well as those who perpetrate the act.

The acts that take away clergy turn upon another point, *viz.* whether they meant to distinguish the offenders, and single out some as being under more aggravating circumstances than others, and deserving more punishment than the rest: as in cases of rape, buggery, and other common-law offences.

So on the statute stabbing, upon which the *King* v. *Page* and *Harwood* was determined. I have no doubt but that the intention of the statute was to distinguish the persons who actually gave the stab. His case differs from the rest in point of aggravation. *Stat. Jac.* 1. *ca.* 8. *Irish.* 7 *Will.* 3. *ca.* 11. 3 *Stat. at large*, 278. *Post.*

The Pick-pocket act is colourable: not so strong nor so clear as that of stabbing: that may be liable to doubt, "*clam et secrete*," suppose the person might not be privy to the private manner of doing it? 8 *Eliz. ca.* 4. *sec.* 2.

In case of robbery in a house, there was great reason for *Powell*'s and *Hawkins*'s doubt, and the legislature thought it necessary to make a new act. Vide *Evans*'s and *Finch*'s case, *Cro. Car.* 473, *upon the* 39 *Eliz. ca.* 15. 2 *Hawk. P. C.* 355. 6 *edit.* 498.

But in the black-act the words are, "if any person, "&c. shall unlawfully and maliciously kill, maim, or "wound any cattle, &c. every person so offending, "being thereof lawfully convicted, shall be adjudged "guilty of felony, and shall suffer death as in cases of "felony, without benefit of clergy." And yet in the aforementioned case of *Simms*, Mr. justice *Foster* had a doubt,

doubt, whether the ſtatute did not confine the offence to the *perſon killing*: but the other eleven judges held the other to be as criminal: and that determination was right. *Ante* 527.

But though we are all clear, "that principals in the "ſecond degree are indictable as principals," yet we have great doubt on this ſpecial verdict as to the particular finding, or indeed whether it finds any thing material at all.

The jury cannot find *evidence*, they muſt find *facts*.

In the caſe of *Meſſenger*, and others, it was agreed that a finding of *all evidence*, and no fact, was not ſufficient; that being *aiding* and *aſſiſting* is matter of fact, and ought to be found by the jury, and that a verdict which only finds, "that the defendant was "*preſent*," but finds no particular act of force committed by him, is not full enough for the court to judge upon. *Kelyng*, 78, 79. *Ante* 527.

This ſpecial verdict has found nothing more than beng aiding and aſſiſting. What the jury ſpecially finds is, that he did then and there encourage and "abet by "*ſhouting* and uſing *expreſſions* to incite; and not other-"wiſe; not with *force* or by any perſonal *act*." They do not find him *ready to aſſiſt*: nor do they uſe any words to find him *aiding* and *aſſiſting*, which are the neceſſary words to be inſerted in a verdict to charge offenders as principals in the ſecond degree. Therefore let it be ſpoken to, when the queſtion, WHAT *is found by this ſpecial verdict*.

ASTON, J. They might have found him to have been aiding and aſſiſting, or at leaſt, ready to aſſiſt. *Hale* and *Hawkins*, and all the writers upon the ſubject, and lord *Coke* in particular, ſpeak of being preſent, aiding and aſſiſting. Therefore aiding and aſſiſting, ought to be expreſsly found. We ought not to depart from that preciſion which is required.

HEWIT, J. concurred.

SECOND ARGUMENT.

The *Attorney General* concluded that the ſpecial verdict was ſufficiently expreſſed to affect the priſoner with the crime charged upon him. He is expreſsly found to have been preſent, and to have encouraged and abetted.

In 2 *Inſt.* 182. lord *Coke* in his comments on *Weſtm.* 1. *ca.* 14. explains the words command, force, *aide*, and reſceitment: and in ſpeaking of the word "aid," he ſays, it comprehends all perſons counſelling, *abetting*, plotting, aſſenting, *conſenting*, and *encouraging* to do the act, and who are *not preſent when the act is done*; for if the party commanding, furniſhing with weapon, or aiding, be preſent when the fact is done, then he is a principal.

In the caſe of murder—If *A* commands *B* to beat *C.* and he beats him ſo that he die thereof, it is murder in *B.* and *A.* if preſent, is alſo guilty of the offence. 1 *Hale, P. C.* 435. 440. *Pult.* 137. *a.*

If any one comes for an unlawful purpoſe, &c. though he do not act, he is yet a principal. 1 *Hale's P. C.* 374. 443. 2 *Hawk.* 311.

Lord MANSFIELD. Your principles are admitted. But the queſtion here is, "Whether he did more than "uſe *expreſſions* to *incite*." We are quite clear with you, that what you mention is *evidence*, from whence a jury might have drawn concluſions; but here the word "*aiding*" is left out, which ſeems to be the technical term. And the finding of the abetting is qualified, for it is found negatively, that he did it "no otherwiſe "than by *ſhouting* and uſing *expreſſions* to incite."

HEWIT, J. The objection is, that it is not expreſsly found "that he *did* aid or aſſiſt:" nor is any force ſhewn to have been uſed by him; but the contrary, "that he "did not uſe force, or *do* any act with his own hands, "&c."

Attorney-general. *Aiding* is not neceſſary nor *aſſiſting*. *Abetting* indeed is neceſſary; but *conſent* alone is ſufficient in the preſent caſe. Here was ſtrong inſtigation, by actual ſhouting and uſing expreſſions to incite: and it is expreſsly found, that he did "*encourage* and *abet*."

Minſhieu, and *Cowell* and *Skinner*, *verbo* "*abet*;" and *Spelman* and *Du Freſne*, all ſhew that inſtigation alone without force, is the ſenſe of the word "*abet*;" and that is always taken in ths *worſt* ſenſe.

Seconds

Seconds to duelliſts are principals in the ſecond degree or not, according to the different deſigns they come upon. 1 *Hale's P. C.* 443, 444.

" *Nullus dicitur felo principalis, niſi actor, aut qui præſens* " *eſt abettans, aut auxilians actorem ad feloniam faciendam.*" 3 *Inſt.* 138. And *Foſter* ſays, " perſons engaged, &c." " will not be involved, unleſs they actually aided and " *abetted.*" It is the *mind*, not the act that conſtitutes the offence, *Foſter* 354.

A ſervant aſſiſting his maſter, but not privy to the maſter's intention, if the perſon againſt whom he aſſiſts him is killed, it is murder in the maſter, becauſe he had malice aforethought; but only homicide in the ſervant. 1 *Hale P. C.* 437, 438.

In *Meſſenger's* caſe *Green* was holden not guilty, becauſe no particular act of force was found againſt him, nor that he was aiding or aſſiſting the reſt. So *Appletree's* caſe and *Bedell's* caſe, nothing was found that ſufficiently charged them. 2 *St. Tr.* 591. *Ante* 527.

Indeed, it is neceſſary to find either *force* or ſomething *contributing* to the guilt. But here is the latter; this was an illegal aſſembly; the defendant abetted and encouraged by ſhouts and expreſſions: the mode of his abetting is found; and contributing to the guilt is implied in the very idea of abetting. The reſult is of courſe. The uſing *expreſſions to excite*, comes up to lord *Hale's* notion of abetting.

Special verdicts need not be ſo nice and ſtrict as either indictments or appeals.

Cox, for the defendants. The preſent caſe depends upon the diſtinction between *aiders* and mere *abetters*. In the caſes that have been cited, where the defendant both aided and abetted, the diſtinction was not neceſſary to be attended to. This man cannot be conſidered a principal in the ſecond degree. This felony is not *malum in ſe*. It was originally a treſpaſs, and only made felony by act of parliament.

In much higher offences, ſuch as ſtabbing a perſon not guilty of a ſufficient proportion of guilt, ſhall not be a principal in the ſecond degree.

Every

Every thing ſhall be taken moſt favourably for the priſoner. This is always laid down and particularly ſo in *Regina* v. *Whiſtler*, and others. 2 *Lord Raym.* 842.

This offence is little more than a treſpaſs. The man *did* nothing; it does not even appear that the expreſſions of incitation were *heard* by the perpetrators of the fact. They ought to have ſhewn, that the miſchief was done in conſequence of theſe expreſſions of incitation. *Aiding and aſſiſting* ought to have been *expreſsly* found. Abetting is only *encouraging*; it may be innocent, for it may be without effect. *Aiding* indeed cannot be innocent; but *abetting* may.

The *King* v. *Page* and *Harwood*, is exactly ſimilar to this caſe. The defendants in that caſe were only preſent and abetting the perſon that did the fact, but uſed *no action* towards the death of the party, and they were admitted to their clergy.

In the caſe of *Meſſenger*, and others, the *aiding* and *aſſiſting* were holden to be eſſentially requiſite to be expreſsly found as a fact. *Green* and *Bedell* were diſcharged, becauſe they were not expreſsly found to be *aiding* and *aſſiſting*. *Ante* 527.

Abetting is leſs than aiding and aſſiſting. The latter is a fact which ought to have been *expreſsly* found by the jury, in order to make this man a principal in the ſecond degree: and no ſuch fact having been found againſt him, he ought to be diſcharged.

The *Attorney-general* ſaid, that as Mr. *Cox* had not put it upon any *new* foot he would not reply.

Lord MANSFIELD. The queſtion intended to be left to the opinion of the court upon this ſpecial verdict was, "whether perſons preſent, aiding and abetting the "others unknown, in beginning to demoliſh and pull "down the dwelling-houſe, who are all principals in "the ſecond degree, were within this ſtatute."

And we are all of us of opinion that they *were*: and we are all very well ſatisfied that we were right in our opinion.

But then a queſtion was ſtarted, "whether the *fact* "of *aiding* and *aſſiſting* was at all *found* by this ſpecial "verdict,

" verdict, as it is worded; the words of it going no further than *encouraging* and *abetting*."

The doubt aroſe on what is ſaid in the caſe of *Meſſenger* and others; and whether the objections that prevailed in thoſe caſes to the want of fulneſs and ſufficiency in the verdict might not prevail in this.

And a doubt particularly aroſe on the omiſſion of expreſsly adding the word "*aiding*:" for though the *evidence* which the jury ſtates in the ſpecial verdict were admitted to be ſufficient to ſupport ſuch a finding, if they had gone on to draw the concluſion, yet this was ſaid to be no more than a finding of mere evidence, without drawing a concluſion from it.

And it was ſaid too, that even the finding " his being " preſent encouraging and abetting, by ſhouting and " uſing expreſſions to incite," was qualified by the negative finding which follows it, " that he did not with " force begin to demoliſh or pull down, or do any act " with his own hands or perſon for that purpoſe, *other-* " *wiſe than as aforeſaid.*"

Tenderneſs ought always to prevail in criminal caſes, ſo far at leaſt as to take care that a man may not ſuffer otherwiſe than by due courſe of law; nor have any hardſhip done him, or ſeverity exerciſed upon him, where the conſtruction may admit of a reaſonable doubt or difficulty.

But tenderneſs does not require ſuch a conſtruction of words (perhaps not abſolutely and perfectly clear and expreſs) as would tend to render the law nugatory and ineffectual, and deſtroy or evade the very end and intention of it: nor does it require of us that we ſhould give into ſuch nice and ſtrained critical objections as are contrary to the true meaning and ſpirit of it. But, however, there being a doubt raiſed upon this ſpecial verdict, we have conſidered it, and taken time to form our opinion and determination upon the validity of the objection.

And we are all of opinion, that the verdict is *ſufficient* to find this man a principal in the ſecond degree.

Aiding is an equivocal term: but *abetting* certainly makes him a principal in the ſecond degree. It is true, the word "*aided*" is not ſpecially uſed in this ſpecial verdict:

verdict: but it is found "that he was preſent and did "then and there encourage and abet, by ſhouting and "uſing expreſſions to incite." The jury have poſitively found the concluſion, "that he *did* encourage and abet." They have alſo found *how* he encouraged and abetted, *viz.* "by then and there ſhouting and uſing expreſſions "to incite the perſons to do the act," but this latter finding *cannot vitiate* their former concluſion, "that he "did then and there encourage and abet."

It is objected, that this is not the *whole* of what they find, for they find further, "that he did *no act* with his "own hands or perſon for that purpoſe, otherwiſe than "as aforeſaid." And it is true, that they have ſo gone on and added this further finding. But it is alſo as true that they have found, "that he was then and there pre-"ſent, and did then and there encourage and abet the "ſaid perſons unknown, in beginning to demoliſh and "pull down the ſaid dwelling houſe, by then and there "ſhouting and uſing expreſſions to incite the ſaid per-"ſons unknown ſo to do."

The jury have expreſsly found, that he encouraged and abetted the offenders, in doing the criminal act mentioned in the indictment: they have found *how* he encouraged and abetted them: and have ſpecified the particular circumſtances of his doing ſo, and theſe circumſtances amount to *evidence* of it: they are in point of law evidence ſufficient to prove "that he did encourage "and abet them."

Therefore there lies no objection in point of form to the ſpecial verdict.

He was preſent encouraging and abetting perſons unknown, to the number of one hundred and more, with force and arms unlawfully, riotouſly, and tumultuouſly, aſſembled together, to the diſturbance of the public peace, in felonioufly with force and force, unlawfully, and with force beginning to demoliſh and pull down a dwelling houſe: and therefore *he is a principal in the ſecond degree.* 4 *Burr.* 2073, *to* 2084.

Rule

Rule the Eighth.

Aiders and abettors in an illegal act are not anſwerable for a homicide, unleſs it appears upon *evidence* to the jury, or by facts ſtated to the court in a ſpecial verdict, that the homicide was committed in purſuance of an illegal act; and in that caſe they are principals in the ſecond degree.

As in the KING *v.* PLUMMER, *Hilary*, 13 *Will.* 3. *B. R.* Special verdict. The caſe was one of a party of ſmugglers being purſued by officers, fired off his fuſee and killed one of his own gang. Queſtion, Was this murder?

HOLT, C. J. Suppoſe it had been found by the jury, that the man who diſcharged the fuſee did it of malice prepenſe, and thereby one of his own gang is killed, it could not affect any of the reſt, for though they are all engaged in an unlawful act, and that by the act of one a man is killed, it will be murder in the other, though he has done nothing, yet his being originally engaged in the unlawful act it makes him guilty of murder. But this has ſeveral qualifications.

Firſt, to make one an abettor in ſuch a caſe it is neceſſary he ſhould know of the malicious deſign; that is that it was unlawful, for if he be ignorant of the deſign, though he be engaged in the unlawful act, foreign from the deſign, he ſhall not be guilty of murder: for it would be hard to make a man an abettor to a collateral act, to the malice whereof he was no way privy. *Hale, Fit. Mur. pl.* 101. *Crompt.* 23.

He then quoted a caſe which happened upon *evidence*. *Old-Bailey, December*, 1664. The ſecretary of ſtate made his warrant to apprehend ſuſpected perſons, directed to the meſſengers. The meſſengers having notice of their being in a houſe, took ſeveral ſoldiers with them to apprehend the perſons, but took no civil officer, neither did they make any demand to have the door open, as they ought by law to do, but broke open the door, when ſome of the ſoldiers fell a plundering and ſtole away ſome goods. The queſtion was, whether this was felony in them all. That they were all engaged in an unlawful act is plain, for they could not juſtify breaking a man's houſe without making demand firſt, and in that

caſe all thoſe who were not privy to the ſtealing were acquitted, notwithſtanding their being engaged in one unlawful act of breaking the door; and the reaſon was, becauſe they knew not of any ſuch intent, but it was a chance opportunity of ſtealing. 12 *Mod.* 628, 629, 630. 1 *Kelw.* 109. *S. C. Kelw.* 66, 67. 8 *Mod.* 1615. *Anonymous.*

So in the KING, *v.* HODGSON, and others, *Old-Bailey*, 1730. This was a ſpecial verdict, found on an indictment for *murder*, to the following effect.

The priſoners, together with ſeveral others, were hired by one O. S. to aſſiſt him in carrying away his houſhold furniture, in order to avoid its being diſtrained for rent. They accordingly aſſembled for this purpoſe, armed with bludgeons and other offenſive weapons. The landlord of the houſe, accompanied on his part by another ſet of men, came to prevent the removal of the goods, and a violent affray enſued. The conſtable was called in and he produced his authority, but could not induce them to diſperſe. While they were fighting in the ſtreet, one of the company, to the jurors unknown, killed a boy who was ſtanding at his father's door looking on, but totally unconcerned in the affray.

The queſtion was, whether thoſe facts amounted to evidence of wilful murder in all.

The point was ſubmitted to the JUDGES in the ſhape of a reſerved caſe.

The two CHIEF JUSTICES were of opinion, that the evidence amounted to murder in all the company, becauſe they were all engaged in an unlawful act, by proceeding in an affray after the conſtable had interpoſed and commanded them to keep the peace, eſpecially as the manner in which they originally aſſembled, *viz.* with offenſive weapons and in a riotous manner, was contrary to law, though the purpoſe for which they aſſembled, *viz.* to carry away the goods was juſtifiable, and to ſhew that where divers go to commit a *diſſeiſin*, and one of them kill a man, the reſt are principal felons, they cited *Stamf.* 17, 40. *Fitzherb. Cor.* 350. *Crompt.* 244. *Ante*, *Rule* 1.

But

But the majority of the JUDGES held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not affect the reſt, for the homicide did not happen in proſecution of the illegal act, and therefore the perſons, though conſtructively preſent, could not be ſaid to be aiding and abetting the death of one who was totally unconcerned in the deſign for which the parties had aſſembled. Vide *the antecedent authorities in this chapter, and Kely.* 70.

And they cited *Plummer's* caſe. 12 *Mod.* 629. And two caſes before HOLT, C. J. the one at *Hereford*, the other at *Sarum aſſizes*, both of which are mentioned by *Foſter*, 353. *Ante* 537.

And in the KING *v.* BROTHWICKE, and others. *Trinity*, 9 *Geo.* 3. *B. R.* It was held, that on an indictment for murder, if the jury find a ſpecial verdict, it is neceſſary in order to affect principals in the ſecond degree, to ſtate either *firſt*, that they were actually preſent; or *ſecondly*, ſome acts done by them at the very time, which unavoidably ſhew that they were preſent; or *thirdly*, that they were of the ſame party, on the ſame purſuits, and under the ſame engagements and expectations of mutual defence and ſupport, with the perſon who did the fact. *Dougl.* 207. *Iriſh edit.* 202.

CHAPTER XI.

How far the Doctrine reſpecting Variance affect the Acceſſary or Abetter.

Rule the Firſt.

WHEREVER a *variance* between an indictment or appeal, and the evidence brought to ſupport them is material or immaterial in reſpect to the *principal*, it will be material or immaterial in reſpect to the *acceſſary*. 2 *Hawk. P. C.* 46.

Therefore if A. B. and C. be indicted for the murder of D. and it is laid in the indictment that A. gave him the ſtroke whereof he died, and that B. and C. were *preſentes, auxiliantes et abettantes*, though upon the *evidence* it appears that B. alone gave the ſtroke whereof he died, and that A. and C. were *preſentes, &c.* it maintains the indictment. *Mackally.* 9 *Co.* 65. *Cro. Jac.* 279. *Ante* 522. 2 *Hale P. C.* 292.

If A. and B. be indicted for the murder of C. and upon the *evidence* it appears that A. committed the fact, and B. was *not* preſent, but was acceſſary before the fact, by commanding it, B. ſhall be diſcharged. 26 *Hen.* 5. 2 *Hale P. C.* 292.

If A. and B. be indicted as principals, and B. is indicted as acceſſary, and C. is indicted as acceſſary to both after the fact done, A. and C. are convicted, or only A. is convicted, and upon the *evidence* it appears he was only acceſſary to A. it maintains the indictment. *Lord Sanchar's ca.* 9 *Co.* 119. *Ante* . 2 *Hale P. C.* 292. 3 *Inſt.* 165.

Rule the Second.

It is ſettled at this day, though there were anciently ſome opinions to the contrary, that if an indictment or appeal againſt A. B. and C. for the death of D. charge A. as giving the mortal blow, and B. and C. as being preſent procuring and abetting, and the *evidence* prove that B. and C. gave the blow, and that A. was only preſent procuring and abetting, yet it maintains the indictment, becauſe in the judgment of law, the act of *any* of them is the act of all. 2 *Hawk. P. C. ca.* 46. *and ca.* 29. *ſec.* 7. to the ſame point. Alſo *ca.* 23. *ſec.* 76. 1 *Hawk. P. C. ca.* 32. *ſec.* 6. *ca.* 31. *ſec.* 31. 50. *ca.* 34. *ſec.* 7. *ca.* 38. *ſec.* 89. *ca.* 41. *ſec.* 6. *Gilb. Evid. by Loft* 860. *Mackally's ca.* 9 *Co.* 67. *Bro. Appeal.* 85 *Corone.* 1 *Hale P. C.* 437, 438. *Plowd. Comm.* 98. *a.*

The KING *v.* WALLIS, and others, *Old-Bailey ſeſſions, October* 1703, was determined on the above rule. Indictment againſt A. for the murder of *John Cooper*; and alſo againſt B. C. D. and E. as perſons preſent, aſſiſting, aiding

aiding and abetting *A.* therein. *A.* being arraigned upon this indictment, pleaded not guilty, and upon *evidence* it appeared that the perſon ſlain was a conſtable, and in the execution of his office, with divers other conſtables, in *May-Fair*. That *A.* the priſoner, firſt drew his ſword, and with divers others, to the amount of fifty perſons, fell upon the conſtables. That this affray continued an hour after until in the end one of the conſtables, *viz.* the ſaid *John Cooper*, was ſlain; but by whoſe hand it did not appear. It alſo appeared that *A.* had been acquitted.

Et per HOLT, C. J. *Firſt*, Though the indictment be againſt the priſoner for aiding, aſſiſting, and abetting *A.* who was acquitted; yet the indictment and trial of this priſoner is well enough; for who actually did the murder is not material; the matter is that a murder was committed, and the other is but a circumſtance, and all are principals in this caſe; therefore if a murder be proved, it is well enough.

Secondly, if a man begins a riot, as in this caſe, and the ſame riot continue, and an officer is killed, he that began the riot as the priſoner did, is a principal murderer, though he did not do the fact. 1 *Salk.* 334, 335.

So in BANSON *v.* OFFLEY. This was an appeal of murder tried in *Cambridgeſhire* againſt three perſons, and the count was, that *Offley* did aſſault the huſband of the appellant, and wounded him in *Huntingdonſhire*, of which wound he did languiſh and die in *Cambridgeſhire*, and that *Lippon* and *Martin* were aſſiſting.

The JURY found a ſpecial verdict, in which the fact appeared to be that *Lippon* gave the wound, and that *Martin* and *Offley* were aſſiſting.

The firſt exception to this verdict was, that the count and the matter therein muſt be certain, and ſo likewiſe muſt the verdict, otherwiſe no judgment can be given; but here the verdict finding that *another* perſon gave the ſtroke, and not that perſon againſt whom the appellants had declared it is directly againſt her own ſhewing. But,

The COURT anſwered to this exception, that it was of no force, and that ſame objection may be made to an indictment; whereas in an indictment, if one gives the ſtroke,

ſtroke, and another is abetting, they are both principally and equally guilty; and an indictment ought to be as certain as a count in an appeal. 3 *Mod. Rep.* 121. *Caſes Temp. An.* 70. Vide *Wilſon* v. *Law.* 1 *lord Raym.* 21, 22; *and the King v. Brotbwick. Dougl.* 210. *Ante*

Rule the Third.

If one be indicted as acceſſary to two, and upon *evidence* appear to have been acceſſory to *one* of them only, yet he ſhall be found guilty. 2 *Hawk. P. C. ca.* 46. *Vide alſo ſame book, ca.* 29. *ſec.* 46, 47. 2 *Hale, P. C.* 292. 40 *Aſſiz.* 25 *Coron.* 263. 7 *Hen.* 4. 36. *b.*

As in lord SANCHAR'S caſe, *Trin.* 10 *Jac.* 1. The ſame rule is laid down in theſe words: Indictments which concern the life of men ought to be framed as near the truth as may *et eo potius*, becauſe they are to be found by the oath of the grand inqueſt, which finding is called *verdictum quaſi dictum veritatis*, and yet it was reſolved, that if one is indicted as acceſſary to two, and he is found acceſſary to one, the verdict is good. 9 *Co.* 119. 2 *Inſt.* 183. 1 *Hale, P. C.* 624.

But it is holden by ſir EDWARD COKE, that if an appeal be brought againſt two as principals, and againſt another as acceſſary to one of them, and one of thoſe charged as principals be found not guilty, the acceſſary is diſcharged; for which he gives this reaſon, that becauſe the plaintiff made him acceſſary to two, he cannot be found acceſſary to one. 2 *Inſt.* 183.

HAWKINS obſerves, that no authority is cited for the maintenance of this opinion, neither doth it ſeem eaſy to reconcile it with the reſolution above mentioned in lord *Sanchar's* caſe, unleſs the rules of evidence on an appeal differ from thoſe on an indictment which they do not as to other variances. 2 *Hawk. P. C. ca.* 46. *Vide in the ſame ca. ſec.* 32, 34, 37, 38, 39. *quibus virgæ erectio adſit, et emiſſio ſeminis ex quodam defectu deſit.*

CHAPTER

CHAPTER XII.

Of Evidence to ſupport an Indictment for high treaſon, on ſtat. 25 Edw. 3. ſtat. 5. ca. 2. and the ſtatutes againſt Coining.

Rule the Firſt.

EVERY ſpecies of evidence which the *common law* allows to be received on proſecutions for felonies is admiſſible againſt and for priſoners charged with high treaſon, but in *England* there are many exceptions by ſtatute. Vide *ca.* 5. *Ante* 15. *ca.* 6. *Ante* 37. *Ca.* 16. 160. *Conſpiracy, ca.* . *and for particular points vide the Index.*

Rule the Second.

On an indictment for compaſſing and imagining the death of the king, *words* being the moſt natural way of expreſſing the imagination of the heart, are conſidered as *evidence* of ſuch imagination. 1 *Hawk. P. C. ca.* 17. *ſec.* 38. *Foſt.* 202, 203.

Therefore commands and perſuaſions to commit treaſon are *evidence* to convict the party commanding and perſuading; for by ſuch means he would be acceſſary to a felony, and it is an uncontroverted rule, that whatever *facts* will make a man *acceſſary* in felony will make him *principal* in treaſon, and yet he does act but by words. 1 *Hawk. P. C. ca.* 17. *ſec.* 39.

There is a plain diſtinction between *overt-acts* and *evidence.* Overt-acts do undoubtedly diſcover the man's intentions, but they are not to be conſidered merely as *matter of evidence,* but as the *means made uſe of to effectuate the purpoſes of the heart.* With regard to homicide, while the rule *voluntas pro facto* prevailed, the overt-acts of compaſſing were ſo conſidered. And though in the caſe of the king overt-acts of leſs malignity and having a more remote tendency to his deſtruction, are, with great propriety, deemed treaſonable; yet ſtill they are conſidered

ſidered as means to effectuate, not barely as *evidence* of the treaſonable purpoſe. Upon this principle *words* of advice or encouragement, and above all conſultations for deſtroying the king, very properly come under the notion of *means made uſe of* for that purpoſe. But *looſe words* not relative to facts are, at the worſt, no more than bare indications of the malignity of the heart. *Ante* .

Rule the Third.

On indictment on 8 & 9 *Will.* 3. *ca.* 26. enacted againſt making or mending inſtruments for coining. Every thing neceſſary to ſhew that the defendant is not within the exceptions muſt be negatively averred; but it is not neceſſary for the proſecutor ſtrictly to *prove* theſe negative facts, for it is incumbent on the defendant to prove the affirmative. 1 *Hawk. P. C.* 7 *edit.* 101. 1 *Burr.* 148. *The King* v. *Maurice Jervis.* 2 *Bur.* 1037. *The King* v. *Pemberton.* *Addington's P. L.* 149.

Rule the Fourth.

To convict a priſoner on the above ſtatute, it muſt appear in evidence that the counterfeit money found in his cuſtody was paſſable, and that the priſoner was poſſeſſed of all the implements and ingredients neceſſary to make ſuch counterfeit money.

As in the KING, *v.* HARRIS and MINION, determined at Serjeant's-Inn-Hall by the judges, *Hilary*, 1776, on a caſe reſerved by ASHURST, J. at the preceding ſeſſions, *Old-Bailey*.

It was an indictment of two counts for high treaſon in counterfeiting the coin. The firſt was framed upon *ſtat.* 25 *Edw.* 3. *ca.* 2. and charged the priſoners with having "coined and counterfeited one piece of the money "of this realm called a ſhilling." The ſecond was founded on *ſtat.* 8 & 9 *Will.* 3. and charged them with having "coined one piece of falſe, feigned, and counter-"feit money and coin to the likeneſs and ſimilitude of "the good, legal, and current money and ſilver coin "of this realm called a ſhilling, againſt the duty of their "allegiance," &c.

The

The evidence was—that when the priſoners were apprehended, *Minion* was ſitting by the fire, and *Harris* had a ſciſſars and metal in his hand, which he was clipping into ſlips more than an inch broad. There was a crucible on the fire and metal melting in it, ſcales and weights, and gold and ſilver lying by them; as alſo flaſks and moulds, and pieces of baſe metal, which appeared to have been caſt in the moulds, the impreſſion upon them exactly reſembling that on one of the good ſhillings which lay near them. But no piece of baſe metal found was in ſuch a ſtate *as to make it paſſable.*

ASHURST, J. Thought the firſt count in this indictment new and ſingular; and it was now introduced for the firſt time. In two recent inſtances where the indictment conſiſted of one count only ſimilar to the ſecond in the preſent indictment, the jury, upon evidence like the preſent, had been directed to acquit the priſoners. In his idea, the different formation of the indictment could not vary the offence, and he directed the jury to acquit the priſoner.

The jury found the priſoners *guilty* on the firſt, but acquitted them on the ſecond. The queſtion ſubmitted to the judges was, whether under theſe circumſtances the conviction was proper, and they were unanimouſly of opinion that it was not. *Leach. Cr. Ca. 3 edit. 163.*

Rule the Fifth.

Evidence of making a round blank, like the ſmooth ſhillings in circulation, the original impreſſion of which has been effaced by wear, will ſupport an indictment charging that the priſoner, one piece of falſe, feigned, and counterfeit money and coin to the likeneſs and ſimilitude to the good, legal, and current coin of this realm, called a ſhilling, falſely and deceitfully, felonioufly and traiterouſly did forge, counterfeit, and coin, &c.

So *ruled* in the KING, *v.* SAMUEL WILSON, *Old-Bailey ſeſſions*, 1783. by EYRE, B. and the priſoner was convicted and executed. *Leach, Cr. Ca. 3 edit. 320, and MS. note.*

Rule the Sixth.

But evidence of forging the impreſſion of the current coin on a piece of metal ſo irregularly, that it will not paſs in currency, will not ſupport an indictment for high treaſon: for the crime is incomplete.

So ruled in the KING, *v.* VARLEY, by the judges on a queſtion reſerved at *York aſſizes*, 1771, by GOULD, J. 2 *Blackſ. Rep.* 682. *Leach. Cr. Ca.* 3 *edit.* 89. *S. C.*

Rule the Seventh.

A conviction of high treaſon may be upon the evidence of *one* witneſs in all caſes where there is no corruption of blood. Vide *the illuſtrations of this rule. Ante* 35.

CHAPTER XIII.

Of Malice.

THE legal doctrine of malice contains the preliminary rules on which every queſtion ariſing from homicide is decided; they have been laid down by *Foſter* with his uſual perſpicuity and judgment, and are now univerſally received by the judges of the land as authorities.

Rule the Firſt.

In every charge of murder, the fact of killing being firſt proved, all the circumſtances of accident, neceſſity, or infirmity are to be proved by the *priſoner*, unleſs they ariſe out of the evidence produced againſt him: for the law preſumeth the fact to be founded in malice until the contrary appeareth. *Foſt.* 256.

And right it is the law ſhould ſo preſume. The defendant in this inſtant ſtandeth juſt upon the ſame foot

ſoot that every other defendant doth; and the matters tending to juſtify, excuſe, or alleviate muſt appear in *evidence* before he can avail himſelf of them. *Ibid.* 1 *Hale, P. C. from* 451 *to* 454.

Rule the Second.

In every caſe where the point turneth upon the queſtion whether the homicide was committed wilfully, or maliciouſly, or under circumſtances juſtifying, excuſing, or alleviating the *matter of fact*; that is to ſay, whether the facts alledged by way of juſtification, excuſe, or alleviation *are true*, is the proper and only province of the jury. *Foſt.* 257.

Rule the Third.

But whether, upon a ſuppoſition of the truth of the facts, ſuch homicide be juſtified, excuſed, or alleviated muſt be ſubmitted to the judgment of the *court*; for the conſtruction the law putteth upon the facts ſtated and agreed or found by a jury is, in this caſe, as in all other caſes, undoubtedly the proper province of the court. *Ibid.*

As in the KING *v.* Major JOHN ONEBY, indicted for the murder of *William Gower*, eſq. *Old-Baily.* RAYMOND, J. after argument on a ſpecial verdict removed into *Banco Reg.* 13 *Geo.* 1. & 1 *Geo.* 2. laid down this propoſition, to which all the judges agreed, that the *court* are judges of the malice and not the *jury*; and that the court are alſo judges of the fact found by the jury, whether if the quarrel was ſudden, there was time for the paſſion to cool, or whether the act was deliberate or not. 9 *St. Tr.* 2 *Lord Raym.* 1493. 2 *Strange*, 773.

FOSTER ſays, in caſes of doubt and real difficulty, it is commonly recommended to the jury to ſtate facts and circumſtances in a ſpecial verdict; but where the law is clear, the jury under the direction of the court, *in point of law*, matters of fact being ſtill left to their determination, may, and if they are well adviſed, will always find a general verdict conformable to ſuch direction.

Ad queſtionem juris non reſpondent juratores. *Foſter*, 257. *The King v. Major Oneby, above cited.*

Rule the Fourth.

MALICE *defined.*—When the law maketh uſe of the term *malice aforethought*, as deſcriptive of the crime of murder, it is not to be underſtood in the modern uſe of the word, *a principle of malevolence to particulars*; for the law by the term *malice*, in this inſtance, meaneth, that the fact hath been attended with ſuch circumſtances as are the ordinary ſymptoms of a wicked, depraved, malignant ſpirit. *Foſt.* 256.

In the caſe of an appeal of death, which was antiently the ordinary method of proſecution, the term *malice* is not made uſe of as deſcriptive of the offence of murder, in contradiſtinction to ſimple felonious homicide. The precedents charge that the fact was done *nequitur in feloniâ*, which fully taketh in the legal ſenſe of the word *malice*. The words *per malitiam* and *malitiosè* our oldeſt writers do indeed frequently uſe in ſome other caſes, and they conſtantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo, mala conſcientiâ*, as they expreſs themſelves. *Foſt.* 256.

The method of proceeding in antient times in a caſe of robbery or larceny, where the ſtolen goods were found, upon the defendant, was, that if he alledged that he bought them of another, whom he named and vouched to warranty, the vouchee, if he appeared and entered into warranty, was to ſtand in the place of the defendant *pro bono et malo*. *De corona, ca.* 32. *ſec.* 7.

Bracton ſaith, *intra quondoque in defenſionem et warrantum aliquis malitiosè et per fraudem et per mercedem, ſicut campio conductitius.* *Lib.* 1. *ca.* 38. *ſec.* 8, 9.

Fleta, on the ſame ſubject, after ſtating the caſe of the hired champion in *Bracton*'s words, putteth another ſimilar to it. A perſon in holy orders entereth into warranty for hire, but refuſeth to take his trial before lay judges, *propter privilegium clericale*. In this caſe, ſaith he, the warranty availeth nothing. "*Et clericus gaolæ pro malitiâ committetur et redimatur.*"

The

The *legiſlature* hath likewiſe frequently uſed the terms *malice* and *maliciouſly* in the ſame general ſenſe, as denoting a wicked purpoſe and incorrigible diſpoſition. *Foſt.* 257.

The ſtatute *de Malefactoribus in parcis* reciteth, that thoſe treſpaſſers did frequently refuſe to yield themſelves to juſtice; "*Immo-malitiam ſuam exequendo et continuando*," did fly or ſtand upon their defence. *Stat.* 21 *Edw.* 1. *ſtat.* 2.

And 4 & 5 *Philip & Mary, ca.* 4. enacteth, "that "every perſon that ſhall *maliciouſly* command, hire, or "counſel any perſon to do any robbery, and being ar- "raigned, ſhall ſtand mute, of *malice*." The word in both part of the act plainly importeth a wicked, perverſe, and incorrigible diſpoſition. *Foſt.* 257.

In the ſame latitude are the words *malice aforethought*, to be underſtood in the ſtatutes which ouſt clergy in the caſe of wilful murder. The *Malus animus*, which is to be collected from all the circumſtances, is what bringeth the offence within the denomination of wilful malicious murder: whatever might be the immediate motive to it, whether it be done as the old writers expreſs themſelves, "*Ira vel odio, vel cauſa Lucri*," or from any other wicked or miſchievous intention. *Foſt.* 257.

And moſt, if not all the caſes ranged under the head of *implied malice*, will turn upon this ſingle point, that the fact hath been attended with ſuch circumſtances as to carry with them the plain inclinations of an heart regardleſs of ſocial duty and fatally bent upon miſchief. *Foſt.* 257.

For example—In the QUEEN *v.* MAWGRIDGE, 5 *Ann. B. R. malice* was thus defined. Some have been led into a miſtake by not well conſidering what the paſſion of malice is; they have conſtrued it to be a rancour of mind lodged in the perſon killing, for ſome conſiderable time *before* the commiſſion of the facts, which is a miſtake ariſing from not diſtinguiſhing between *hatred* and *malice*. *Envy, hatred*, and *malice* are three diſtinct paſſions of the mind. 1ſt. *Envy* properly is a repining or being grieved at the happineſs and proſperity of another, *Invidus alterius rebus macreſcit opimis*. 2d. *Hatred*, which

which is *odium*, is as *Tully* ſaith, *Ira inveterata*, a rancour fixed and ſettled in the mind of one towards another, which admits of ſeveral degrees. It may arrive at ſo high a degree, and may carry a man ſo far as to wiſh the hurt of him, though not to perpetrate it himſelf. 3d. *Malice* is a deſign formed of doing miſchief to another, *cum quis data opera male agit*, he that deſigns and uſeth the means to do ill, is malicious. 2 *Inſt.* 42.

By *ſtat.* 5 *Hen.* 4. if any one out of malice prepenſed ſhall cut out the tongue or put out the eye of another, he ſhall incur the pain of felony. If one doth ſuch a miſchief of a ſudden, that is, malice prepenſed; for, ſaith *Coke*, if it be *voluntarily, the law will imply malice. Kelyng.* 126. *Holt.* 484. See alſo *Holloway's caſe, Cro. Car.* 131. *W. Jones*, 198. 1 *Hale, P. Cr.* 454. *Palm.* 585.

The definition of *malice implied* is, where it is not expreſs in the nature of the act; as where a man kills an officer that had authority to arreſt his perſon: the perſon who kills him in defence of himſelf from the arreſt, is guilty of *murder*, becauſe the malice is implied; for properly and naturally it was not malice, for his deſign was only to defend himſelf from the arreſt. *Ibid. Vide this point illuſtrated, Ante* 485 *to* 491.

In the KING, *v.* ONEBY, *Trinity*, 13 *Geo.* 1. *and Geo.* 2. *B. R.* the ſame doctrine is laid down. The court there ſaid, without entering into a nice examination of the ſeveral definitions or deſcriptions of murder as they are found in the old law-books, as *Bracton, Briton*, and *Fleta*, where the wickedneſs of the act is aggravated by circumſtances of ſecrecy or treachery, murder has been long ſince ſettled to be the *voluntary killing* a perſon of *malice prepenſe*, and that, whether it was done ſecretly or publicly. *Staundf. Pl. Cr.* 18. *b.* 3. *Inſt.* 54. 9 *St. Tr.* 19. 2 *Lord Raym.* 1493. 2 *Stra.* 773.

But then it muſt be conſidered what the word malice in ſuch caſe imports. In common acceptation malice is took to be a ſettled anger (which requires ſome length of time) in one perſon againſt another, and a deſire of revenge; but in the *legal* acceptation it imports a wickedneſs, which includes circumſtances attending an act, that cuts off all excuſe.

By

By 25 *Hen.* 8. *ca.* 33, for taking away clergy, it is enacted, that every perſon who ſhall be indicted of the crimes therein mentioned and thereupon arraigned and ſtand mute of *malice* or frowardneſs of mind, ſhall loſe the benefit of his clergy. Now in that caſe malice can never be underſtood in its vulgar ſenſe; for the party cannot be thought to ſtand mute out of a ſettled anger or deſire of revenge, but only to ſave himſelf; and therefore ſuch ſtanding mute and refuſing to ſubmit to the courſe of juſtice, is ſaid to be done wickedly, that is, without any manner of excuſe, or out of frowardneſs of mind.

This malice is an eſſential ingredient to make the killing a perſon murder, and muſt be either *implied* or *expreſſed*: and this implied malice is collected either from the manner of doing or from the perſon ſlain, or the perſon killing. *Hale. P. C.* 451.

As to the firſt, the manner of doing, or the nature of the action, *Firſt*, wilfully poiſoning any man implies malice. *Secondly*, If a man doth an act that apparently muſt do harm, with an intent to do harm, and death enſues, it will be murder. As if *A.* runs with a horſe uſed to ſtrike, among a multitude of people, and the horſe kills a man, it will be murder, for the law implies malice from the nature of the act. *Thirdly*, killing a man without provocation is murder. *Lord Morley's ca. Keyling* 56. *Keit's ca.* 1 *Lord Raym.* 138. *Comb.* 406. *Tooley's ca.* 2 *Lord Raym.* 1298.

Rule the Fifth.

The law will imply malice from the nature of the original action or firſt aſſault, though blows paſs between the parties before the ſtroke is given which occaſions the death. *Hugget's caſe, Keyl.* 62. *Tooley's caſe, and Oneby's caſe.* 2 *Lord Raym.* 1300, 1302. 1489. *Ante*

Rule the Sixth.

Malice expreſs being a deſign formed for taking away another man's life, or of doing ſome miſchief to another, in

in the execution of which deſign death enſues; ſuch death is murder, even where ſuch deſign is not formed againſt any particular perſon. *Lord Dacre's caſe.* 1 *Hale's P. C.* 465. *Moor* 86. *Sav.* 67. 2 *Lord Raym.* 1485. *S. C. with arguments of counſel.* *Stra.* 766. *S. C. with the evidence and indictment.* 9 *St. Tr.* 14. 2 *Lord Raym.* 1584. *Huggin's caſe.*

Rule the Seventh.

Where an indictment ſets forth all the ſpecial matter in reſpect whereof the law implies malice, a variance between the indictment and evidence, as to the circumſtances doth not hurt, ſo that the ſubſtance of the matter be found. 2 *Hawk. P. C. ca.* 46.

As in *Mackally's* caſe, *Eaſt.* 9 *Jac.* 1. The priſoner was indicted for the murder of a ſerjeant at mace, in *London*, upon an arreſt. It was ſuppoſed that the ſheriff had made a precept to ſuch ſerjeant for the arreſt, but upon the *evidence* it appeared that there was not any ſuch precept, but that the ſerjeant made the arreſt *ex officio* at the plaintiff's requeſt upon the entry of the plaint according to the cuſtom of the city. The court ruled the killing of the officer to be murder; for the ſubſtance of the matter is, whether the defendant killed an officer in the legal execution of his duty. 9 *Co.* 62. Vide *Ante* 485.

Vide *the foregoing rules in this chapter, illuſtrated in the next ſubſequent chapter on homicide.*

CHAPTER XIV.

OF HOMICIDE.

HOMICIDE, according to *Foſter's* diſtinctions is, either occaſioned by accident, which human prudence cannot ſee or prevent, vulgarly called *chance-medley*; or is founded in juſtice; or in neceſſity; or is owing to a ſudden

ſudden tranſport of paſſion, which through the benignity of the law, is imputed to human infirmity, and is called *manſlaughter*; or is founded in *malice*, which conſtitutes *murder*. Vide *the laſt antecedent chapter*.

By *murder*, at this day is underſtood, the wilful killing of any ſubject whatſoever, through *malice forethought* whether the perſon ſlain be a native or foreigner. *Stamf. l.* 1. *c.* 10. 3 *Inſt.* 47.

And the indictment of murder eſſentially requires theſe words, *felonicè ex malitiâ ſuâ precogitatâ interfecit et murdravit*: but the indictment of ſimple homicide is only *felonice interfecit*. 1 *Hale P. C.* 450. Vide 1 *and* 2 *rule, ca. Malice. Ante* 546, 547. 4 *Blackſ. Comm.* 194.

Rule the Firſt.

In order to bring the caſe within the meaning of *chance medley*, that is homicide occaſioned by accident, which human prudence could not foreſee or prevent, there muſt be *evidence* to ſhew, that the act upon which the death enſued was lawful. *Foſt.* 258.

For if the act be *unlawful*, that is *malum in ſe*, the caſe will amount to felony, either murder or manſlaughter, as the circumſtances given in evidence may vary the nature of it. If it be done in proſecution of a felonious intention, it will be murder; but if the intent went no further than to commit a bare treſpaſs, manſlaughter. *Ibid.*

Foſter thus illuſtrates the above rule. A. ſhooteth at the poultry of B. and by accident killeth a man; if his *intention* was to *ſteal* the poultry, which muſt be collected from circumſtances (given in *evidence*) it will be murder, by reaſon of that felonious intent; but if it was done wantonly and without that intention, it will be barely manſlaughter. *Foſter* 259. *Kelynge* 117. 3 *Inſt.* 56.

Rule the Second.

But if the act be not *malum in ſe*, but *malum prohibitum*, as ſhooting at game, by a perſon not qualified by

ſtatute to keep a gun, or to uſe a gun for that purpoſe, the caſe of a perſon ſo offending, will fall under the ſame rule as that of a qualified man, for the ſtatutes prohibiting the deſtruction of the game *under certain penalties*, will not in a queſtion of this kind, enhance the accident beyond its intrinſic moment. *Foſter* 259. 1 *Hale* 475.

Rule the Third.

Death enſuing from accidents happening at ſports and recreations, *ſuch* recreations being *innocent* and allowable, falls within the rule of excuſeable homicide. *Foſt.* 259.

Rule the Fourth.

If an action unlawful in itſelf be done deliberately, and with intention of miſchief, or great bodily harm to particulars, or of miſchief indiſcriminately, fall where it may, and death enſue, againſt or beſide the original intention of the party, it will be murder. But if ſuch an original intention doth not appear, which is matter of *fact*, and to be collected from circumſtances (given in *evidence*) and the act was done heedleſsly and incautiouſly, it will be manſlaughter, not accidental death; becauſe the act upon which death enſued was unlawful. *Foſter* 261.

Rule the Fifth.

Where a blow aimed at one perſon lighteth upon another and killeth him, this is murder. *Foſt.* 261.

As in the KING *v.* PLUMMER, *Kent aſſizes*, *Summer*, 18 *Will.* 3. *Plummer*, and ſeven others, oppoſed the king's officers in the act of ſeizing wool. One of thoſe perſons ſhot off a fuſee and killed one of his own party.

The COURT held, in giving judgment upon a ſpecial verdict, that as the priſoner was upon an unlawful deſign, if he had in purſuance thereof diſcharged the fuſee againſt any of the king's officers that came to reſiſt

ſiſt him, in the proſecution of that deſign, and by accident had killed one of his own accomplices, it would have been murder in him. As if a man out of malice to A. ſhoots at him to kill him, but miſſes him and kills B. it is no leſs a murder than if he had killed the perſon intended. 12 *Mod.* 627. *Kelyng* 111. *Lord Raym.* 1581. 9 *St. Tr.* 112. *Higgins's caſe. Dyer* 128. *Pl.* 60. *Cromp.* 101. *Pl.* 474. 9 *Co.* 81, *Agnes Gore's caſe. D. Williams's caſe, cited in the Queen* v. *Mawgridge. Kelyng* 131, 132. 9 *St. Tr.* 61.

So in the QUEEN *v.* SAUNDERS, *Hilary*, 18 *Eliz.* The defendant intending to kill his wife gave her a poiſoned apple, and ſhe being ignorant of the apple's being poiſoned, gave it to a child, againſt whom the priſoner never meant any harm, and againſt his will and perſuaſion, and the child eat it and died. This was ruled to be murder in him, but not in the wife, 2 *Plowd. Com.* 474.

So in the KING *v.* AGNES GORE, *Mich.* 9 *Jac.* 1. before FLEMING, C. J. and TANFIELD, C. B. The priſoner mixed poiſon in an electuary, of which her huſband and her father, and another took part and fell ſick. *Martin*, the apothecary, who had made the electuary, on being queſtioned about it, to clear himſelf took part of it and died. On this evidence a queſtion aroſe, whether *Agnes Gore* had committed *murder*; and the doubt was, becauſe *Martin*, of his own will, without invitation or incitation or procurement of any, had not only eaten of the electuary, but had by ſtirring it ſo incorporated the poiſon with the electuary, that it was the occaſion of his death.

The JUDGES reſolved, that the priſoner was guilty of the murder of *Martin*, for the law conjoins the murderous intention of *Agnes* in putting the poiſon into the electuary to kill her huſband, with the event which thence enſued; *Quia eventus eſt qui ex cauſâ ſequitur, et dicuntur eventus quia ex cauſis eveniunt*, and the ſtirring of the electuary by *Martin*, without putting in the poiſon by *Agnes*, could not have been the cauſe of his death. 9 *Co.* 81. 1 *Hale P. C.* 50. *Jenk. Cent.* 290. *Cromp.*

Juſt. 23. *pl.* 24. 3 *Inſt.* 51. *Plowd. Com.* 474. 1 *Hawk. P. C. ca.* 31. *ſec.* 3. 1 *Hale P. C.* 431, 436, 442, 447.

With the deciſions in the above caſes *Foſter* concurs: for, ſays he, if from circumſtances it appears, that the injury intended to A. be it by poiſon, blow, or any other means of death, would have amounted to murder, ſuppoſing him to have been killed by it, it will amount to the ſame offence, if B. happeneth to fall by the ſame means. For where the injury intended againſt A. proceeded from a wicked, murderous, or miſchievous motive, the party is anſwerable for all the conſequences of the action, if death enſueth from it, though it had not its effect upon the perſon he intended to deſtroy. The *malitia* already explained, the heart regardleſs of ſocial duty, and deliberately bent upon miſchief, and conſequently the guilt of the party is juſt the ſame in the one caſe as in the other. But, if the blow intended againſt A. and lighting on B. aroſe from a ſudden tranſport of paſſion, which in caſe A. had died by it, would have reduced the offence to manſlaughter, the fact will admit of the ſame alleviation if B. ſhould happen to fall by it.

From this it appears, that ſuch circumſtances as above ſtated, cannot be legally nor juſtly brought within the rule of *accidental death*, as they ſometimes are, through the ignorance or lenity of juries. *Foſt.* 261, 262.

Rule the Sixth.

It is not ſufficient that the act upon which death enſueth be lawful or innocent, it muſt be done in a proper manner, and with due caution, to prevent miſchief.

For example.—Parents, maſters, and other perſons, having authority *in foro domeſtico*, may give reaſonable correction to thoſe under their care; and if death enſue without their fault, it will be no more than accidental death. *Foſt.* 262. *Dalton's Juſt. laſt edit.* 285. 1 *Hale P. C.* 454.

But if the correction exceedeth the bounds of due moderation, either in the meaſure of it, or in the inſtrument made uſe of for that purpoſe, it will be either murder

murder or manſlaughter, according to the circumſtances of the caſe.

If with a cudgel or other thing not likely to kill, though improper for the purpoſe of correction, manſlaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and ſtrength of the party, murdered. *Foſt.* 262. *Comb.* 408. 1 *Hale P. C.* 474. *Kelyng* 64, 133, 134.

As in the KING *v.* JOHN GREY, *Old-Bailey ſeſſ. October*, 1666. The jury by a ſpecial verdict found, that *William Golding*, apprentice to the priſoner, having neglected his buſineſs, was reprimanded by his maſter, who ſaid if he would not ſerve him, he ſhould ſerve in Bridewell, to which *Golding* replied, he had as good ſerve in Bridewell as ſerve him; whereupon *Grey*, without other provocation, ſtruck *Golding* with a bar of iron which he then had in his hand, of which he died.

The JUDGES were all of opinion, that this was *murder*; for correction muſt be by ſuch things as are fit for correction, and not by inſtruments as may probably kill. It is all one as if he had run him through the body; and in ſuch caſes if death enſues, the law ſhall judge it malice prepenſed; and as in lord *Morley*'s caſe it is ruled, that words are no provocation to leſſen the offence from being murder, if one man kill another upon ill words given to him. *Kelyng* 53, 65.

Rule the Seventh.

In all caſes of homicide, occaſioned by perſons following their lawful occupations, eſpecially ſuch from whence danger may probably ariſe, it is incumbent on the defendant to ſhew by *evidence* that he has uſed all due caution. *Foſt.* 262.

For example.—Workmen throwing ſtones, &c. from a houſe in the ordinary courſe of their buſineſs, by which a perſon underneath happened to be killed. If they look out and give timely warning before-hand to thoſe below, it will be *accidental death*. If, without ſuch caution, it will be at leaſt *manſlaughter*. It was a lawful act, but done

done in an improper manner. 1 *Hale* 472. *Foſt.* 262, 263.

In the KING *v.* HULL, *Old-Bailey ſeſſ. January*, 1664. The preceding points are illuſtrated: but it is there alſo holden, that there is a great difference where the houſe ſtands a diſtance from the highway, and the doing the ſame act in the ſtreets of *London*; in the firſt caſe where proper caution is given, the death will be but *miſadventure*; but in *London* it would be *manſlaughter*, becauſe there is a continual concourſe of people paſſing up and down the ſtreets; and therefore the caſting down any ſuch thing from a houſe, is like the caſe where a man ſhoots an arrow or a gun into a market-place full of people, if any one be killed, it is manſlaughter, becauſe, in common preſumption, his intention was to do miſchief.

So a perſon driving a cart or other carriage happeneth to kill. If he ſaw, or had any timely notice of the miſchief likely to enſue, and yet drove on, it will be *murder*, for it was wilfully and deliberately done. If he might have ſeen the danger, but did not look before him, it will be *manſlaughter*, for want of due circumſpection. But if the accident happened in ſuch a manner that no want of due care could be imputed to the driver, it will be *accidental death*, and the driver will be excuſed. *Kelyng* 40.

The KING *v.* RAMPTON, *Old-Bailey*, *January ſeſſ.* 1664, is in point. The defendant found a piſtol in the ſtreet, which he had reaſon to believe was not loaded, *having tried it with the rammer*, he carried it home and ſhewed it to his wife, and ſhe ſtanding before him, he pulled up the cock and touched the trigger; the piſtol went off and killed the woman. This was ruled manſlaughter. *Kelyng* 41.

FOSTER obſerves, that chief juſtice HOLT is diſſatisfied with this determination; and admitting it to be ſtrictly legal it was *ſummum jus*, and adds, that the rule of law touching the conſequence of taking or not taking due precaution, doth not ſeem to be ſufficiently tempered with mercy. The caſe of *Brampton*, he thinks not ſtrictly legal, for the law in theſe caſes doth not require the *utmoſt* caution that *can be uſed*, it is ſufficient that a reaſonable

reaſonable precaution, what is *uſual* and ordinary in ſuch caſes, be taken. *Foſter* 264.

Rule the Eighth.

If the officer of juſtice who is to execute ſentence of death on a malefactor, on his own head and without warrant, or the colour of authority varieth from the judgment, he is guilty of murder. Vide 1 *Hale P. C. from* 496 *to* 502. *Foſter* 267.

For he wilfully and deliberately acteth in defiance of law, and in ſo doing, ſheddeth the blood of a man, whoſe perſon, until execution is done upon him in due courſe of juſtice, is equally under the protection of the law with every other ſubject. *Foſt.* 267, 268. 3 *Inſt.* 52, 211.

Rule the Ninth.

Where perſons having authority to arreſt or impriſon, uſing the proper means for that purpoſe, are reſiſted in ſo doing, and the party making reſiſtance is killed in the ſtruggle, *evidence* of ſuch reſiſtance juſtifies the homicide. *Foſt.* 270. Vide *Ante* 485, *to this point.*

Rule the Tenth.

But if the party having authority to arreſt or impriſon in a caſe criminal or civil, uſing the proper means, happeneth to be killed, it will be murder in all againſt whom there is *evidence* of having taken a part in ſuch reſiſtance, for it is homicide committed in deſpite of the juſtice of the kingdom. *Foſt.* 270. 3 *Inſt.* 56. *Roll. Rep.* 189. *Ante* 485.

Rule the Eleventh.

Evidence of flight in order to avoid an arreſt in a civil proceeding, and likewiſe in ſome caſes of a criminal nature, will not juſtify the defendant; but the homicide

homicide will, notwithſtanding the flight, be murder or manſlaughter, as the circumſtances may vary. *Foſter* 271. 1 *Hale P. C.* 481.

For example.—If the officer in the heat of the purſuit, and merely in order to overtake the defendant, ſhould trip up his heels, or give him a ſtroke of an ordinary cudgel, or other weapon not likely to kill, and death ſhould unhappily enſue, this will amount to no more than *manſlaughter*; if, in ſome caſes, even to that offence; but had he made uſe of a deadly weapon, it would have amounted to *murder*. In the firſt place the blood was heated in the purſuit of a lawful prey, and no ſignal miſchief was intended. In the ſecond there would be evidence of *malice*, which determines the nature of the offence. *Foſter* 271.

Rule the Twelfth.

The ſame rule holds in the caſe of a breach of the peace, or any other miſdemeanor ſhort of felony. *Foſter* 271.

Rule the Thirteenth.

Where a felony is committed, and the felon flieth from juſtice, or a dangerous wound is given; if in the purſuit the party flying is killed, *where he cannot be otherwiſe overtaken, evidence* of the felony and the flight will juſtify the homicide. *Foſter* 271.

For it is the duty of every man to uſe his beſt endeavours for preventing an eſcape; and therefore the purſuit is not barely warrantable; it is what the law requireth and will puniſh the wilful neglect of: and probably on this rule it was, that the legiſlature in the caſe of the marquis *De Guiſcard*, who ſtabbed Mr. *Harley* ſitting in council, diſcharged the party who was ſuppoſed to have given him the mortal wound, from all manner of proſecution on that account, and declared the killing to be a *neceſſary* and *lawful* action. *Foſter* 271. 1 *Hale P. C.* 489, 490. *Stat.* 9 *Ann. ca.* 16. 9 *St. Tr.* 63. *in note.*

Rule

Rule the Fourteenth.

But if the *felon*, or *perſon giving* a dangerous wound turns upon the purſuers, and in the ſcuffle any of them is killed, evidence of *reſiſting* makes it murder in the party purſued and all his adherents, preſent and knowingly abetting; for the reaſons given above. *Foſt.* 272.

Rule the Fifteenth.

Even in caſe of a ſudden affray, where no felony is committed or wound given, if a perſon interpoſing to part the combatants, *giving notice to them of his friendly intention*, ſhould be aſſaulted by them, or either of them, and in the ſtruggle ſhould happen to kill, this would be juſtifiable homicide. *Foſter* 272.

As in the KING *v.* THOMAS TOMSON, *Old-Bailey, Car.* 2. indicted for the murder of *Allen Daws*. The COURT on conſidering the fact, ſpecially found by the jury, agreed, that if upon a ſudden affray, a conſtable or watchman, or any other that came in aid of them, who endeavour to part the combatants be killed, this is *murder*. So in *Young's* caſe. 4 *Co.* 40. *Mackally's* caſe. 9 *Co.* 81. *Kelyng* 66.

Rule the Sixteenth.

Likewiſe, if no conſtable or watchman be there, if any other perſon come to part the affrayers, and he be killed, this is *murder*.

For every one, in ſuch caſe, is bound to aid and preſerve the king's peace.

Rule the Seventeenth.

But in all thoſe caſes it is neceſſary that the party who was fighting, and killed him that came to part them, did know or had notice given him, that they came for that purpoſe. *Kelyng* 66. 9 *Co.* 81. 8 *Mod.* 164. *Anonymous. Stamf. P. C.* 13. 2 *Inſt.* 52. *Foſt.* 272.

Rule the Eighteenth.

In caſe of juſtifiable ſelf-defence, the injured party may repel force by force in defence of his perſon, habitation, or property, againſt one who manifeſtly intendeth and endeavoureth by violence or ſurprize, to commit a known felony upon either. In theſe caſes he is not obliged to retreat, but may purſue his adverſary until he findeth himſelf out of danger, and if in a conflict between them he happeneth to kill, ſuch killing is juſtifiable. *Foſt.* 273, 274. 1 *Hawk. P. C. 6 Edit.* 122. 1 *Hale P. C.* 481, 484.

A. makes an aſſault upon B. with an intent to raviſh her, ſhe kills him in the attempt, it is *ſe defendendo*; becauſe he intended to commit a felony. Here the law of ſelf-defence coincideth with the dictates of nature. 1 *Hale, P. C.* 481. *Foſt.* 274.

So, as in the KING *v.* COOPER, *Eaſt.* 15. *Car.* 1. An attempt is made to commit arſon or burglary in the habitation; the owner, or any part of his family, or even a lodger with him, may lawfully kill the aſſailants for preventing the miſchief intended. *Cro. Car.* 544. *Foſt.* 274.

So in the KING *v.* FORD, 18 *Car.* 2. Perſons rudely forcing themſelves into a room in a tavern, againſt the will of the company in poſſeſſion, one of the aſſailants is killed in the ſcuffle; ruled juſtifiable homicide. *Kelyng* 52. Doubted to be law. *Foſter* 274.

In the QUEEN *v.* MAWGRIDGE, 5 *Ann. Ban. Reg.* The defendant upon words of anger threw a bottle with great violence at the head of the deceaſed, and *immediately drew his ſword*; the deceaſed returned the bottle with equal violence. HOLT, C. J. ruled it was lawful and juſtifiable, for he that hath manifeſted that he hath malice againſt another is not fit to be truſted with a dangerous weapon in his hand. *Kelyng* 128, 129. *Foſt.* 271, 274, 275.

Rule the Nineteenth.

He who in a caſe of mutual conflict would excuſe himſelf upon the foot of ſelf-defence muſt ſhew, by *evidence*, that before a mortal ſtroke given he had declined any farther combat, and retreated as far as he could with ſafety, and alſo that he killed his adverſary through mere neceſſity and to avoid immediate death. If he faileth in either of theſe circumſtances he will incur the penalties, of manſlaughter. *Foſt.* 277.

For example: *A.* being aſſaulted by *B.* returneth the blow, and a fight enſueth. *A.* before a mortal wound given declineth any farther conflict, and retreateth as far as he can with ſafety, and then in his own defence killeth *B.* this is excuſable ſelf-defence; even though *A.* had given ſeveral blows, not mortal, before his retreat. 1 *Hale, P. C.* 479. *Stamf.* 15. *Foſt.* 277.

But if the mortal ſtroke had been firſt given, it would have been manſlaughter. *Ibid.*

But if the firſt aſſault be upon *malice*, and the aſſailant to give himſelf ſome colour for putting in execution the wicked purpoſes of his heart, *retreateth* and then turneth and killeth, this will be *murder*. If he had killed without retreating, it would undoubtedly have been ſo; and the craft of flying rather aggravateth than excuſeth, *Foſt.* 277. 1 *Hale, P. C.* 479, 480. *Kelyng*, 58, 128. *Mowgridge's caſe.* The ſecond part of the rule is illuſtrated,

In the KING *v.* NAILOR, *Old-Bailey, April ſeſ.* 1704. The priſoner was indicted for the murder of his broher. The evidence was that he, on the night the fact was committed, came home drunk. His father ordered him to go to bed, which he refuſed to do, whereupon a ſcuffle happened between the father and ſon. The deceaſed, who was then in bed, got up, fell upon the priſoner, threw him down, beat him upon the ground, and there kept him down, ſo that he could not eſcape nor avoid the blows; and as they were ſo ſtriving together,

the priſoner gave the deceaſed a wound with a pen-knife, of which wound he died.

HOLT, C. J. and all the other judges held it was manſlaughter; for there did not appear to be *any inevitable neceſſity* ſo as to excuſe the killing in this manner. *Foſt.* 278. 3 *Inſt.* 55. 1 *Hale, P. C.* 466. 4 *Blackſ. Comment.* 186, 191. 5 *Burr.* 2759. *Lord Raym.* 1496. *Stra.* 481. *Cowp.* 832. 1 *Hawk. P. C.* 125. *Leach. Cr. Ca.* 2 *edit.* 135. *Brown's caſe.*

Rule the Twentieth.

Words of reproach, how grievous ſoever, are not provocation ſufficient to free the party killing from the guilt of *murder*. Nor are indecent provoking actions or geſtures expreſſive of contempt or reproach without an aſſault upon the perſon. 1 *Hale, P. C.* 456. *Foſt.* 290.

So ruled in the KING *v.* Lord MORLEY, by KEYLING, C. J. and all the other judges, *April*, 18 *Car.* 2. But if upon ill words both parties ſuddenly fight, and one kill the other, this is *manſlaughter*; for it is a combat betwixt two upon ſudden heat. *Keyling*, 55.

The above rule governs every caſe where the party killing upon ſuch provocation maketh uſe of a deadly weapon, or otherwiſe manifeſteth an intention to kill, or do ſome great bodily harm. But if he had given the other a box on the ear, or had ſtruck him with a ſtick, or other weapon *not likely to kill* and had *unluckily and againſt his intention* killed, it had been but manſlaughter. *Mawgridge's caſe. Kelyng*, 131. *Foſt.* 290, 291.

For in the former the *malitiæ* evidently appears; in the latter it is evidently wanting.

Rule the Twenty-firſt.

In all other caſes of homicide, upon ſlight provocation, the weapon made uſe of or other circumſtance that the party intended to kill, or do ſome other bodily harm, will be evidence to make ſuch homicide murder. *Foſt.* 291.

If

If *A.* finding a treſpaſſer on his land, in the firſt tranſports of his paſſion beateth him and unluckily happeneth to kill, this hath been holden to be *manſlaughter.* 1 *Hale*, 473.

But, as in MAWGRIDGE's caſe, it muſt be underſtood, that he beat him not with a miſchievous intention, but merely to chaſtiſe for the treſpaſs, and to deter him from committing the like: for if he had knocked his brains out with a bill or hedge-ſtake, or had given him an outrageous beating with an ordinary cudgel beyond the bounds of a ſudden reſentment whereof he had died, it had been *murder*, for theſe circumſtances are ſome of the genuine ſymptoms of the *mala menſe*. *Kelyng*, 132. *Foſt.* 291.

So in the KING *v.* HOLLOWAY, *Mich.* 4 *Car.* 1. *B. R.* It appeared that the defendant found a boy ſtealing wood in his maſter's ground, he bound him to his horſe's tail, and beat him. The horſe took fright, and dragged the boy on the ground ſo that he died. This was holden to be *murder*; for it was a deliberate act and favoured of cruelty. *Cro. Car.* 131. *Palm.* 545. *Jones (W.)* 198. *Kelyng* 127. *Cromp.* 136. *Dalt.* 245. 1 *Hales, P. C.* 454. *Foſt.* 292. 1 *Hawk. P. C. 6 edit.* 126. 3 *Bac. Ab.* 668. 1 *Stra.* 501.

Alſo in the KING *v.* STEDMAN, *Old-Bailey ſeſ. April*, 1704. The priſoner *Stedman*, a foot-ſoldier, ran haſtily towards the combatants. A woman ſeeing him run in that manner cried out, "You will not murder the man, "will you." *Stedman* replied, "What is that to you, "you bitch." The woman thereupon gave him a box on the ear, and *Stedman* ſtruck her on the breaſt with the pummel of his ſword. The woman then fled, and *Stedman* purſuing her ſtabbed her in the back.

HOLT, C. J. was at firſt of opinion that this was murder. A ſingle box on the ear from a woman not being a ſufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear, and it was propoſed to have the matter found ſpecially. But it afterwards appearing, in the progreſs of the trial, that the woman ſtruck the ſoldier in the face with an iron patten, and drew a great deal of blood, it

was

was holden clearly to be no more than *manſlaughter*. For, ſays *Foſter*, the ſmart of the man's wound and the effuſion of blood might poſſibly keep his indignation boiling to the moment of the fact. *MSS. Tracy and Denton. Foſt.* 292.

The KING *v.* REASON and TRANTER, for the murder of *Edward Lutteral*, eſq. *Hil.* 8 *Geo.* 1. further illuſtrates. Mr. *Lutteral* being arreſted, prevailed on one of the officers to go with him to his lodgings, while the other was ſent to fetch the attorney's bill, in order, as *Lutteral* pretended, to have the debt and coſts paid. Words aroſe at the lodgings about *civility money*, and *Lutteral* went up ſtairs pretending to fetch money for the payment of the debt and coſts, leaving the officer below. He returned with a brace of piſtols loaded, which at the importunity of his ſervant he laid down on the table, declaring, he would not be forced out of his lodgings, and threatened the officers ſeveral times. Words of anger ariſing, *Lutteral* ſtruck one of the officers on the face with a cane, and drew blood. He had a ſword on, which was found drawn and broken: but how that happened did not appear in evidence, for part of the affray was at a time when no witneſs was preſent. One of the officers appeared to have been wounded in the hand by a piſtol ſhot, for both the piſtols were diſcharged, and in the wriſt, by a ſharp-pointed inſtrument, the other ſlightly wounded by a like weapon; and it alſo appeared that *Lutteral*, when on the ground, held up his hands as if he was begging for mercy.

Sir JOHN PRATT, C. J. directed the jury, that if they believed Mr. *Lutteral* endeavoured to reſcue himſelf, it would be juſtifiable homicide in the officers. However, as Mr. *Lutteral* gave the firſt blow, *accompanied with menaces to the officers, and the circumſtance of producing loaded piſtols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid or bail given, it could be *no more* than manſlaughter.

Foſter concurs with the chief juſtice, and obſerves that the caſe, as related by *Strange*, is imperfect. *Foſt.* 293, 294. 1 *Stra.* 499. 6 *St. Tr.* 195.

In

In ROWLEY's or ROYLEY's caſe, the ſon fights with a boy and is beaten; he runs home to his father bloody; the father takes a *ſtaff*, runs three quarters of a mile, and beat the other boy, who dies of the beating. This, ſay the above reporters, has been ruled manſlaughter, *becauſe done in a ſudden heat of paſſion*. FOSTER is of opinion that theſe circumſtances ſhew *malice*, but vindicates the opinion of the court by ſhewing that *Coke* does not ſtate with what *weapon* or to what *degree* the child was beaten; whereas *Croke* reporting the ſame caſe ſays: "*Rowley* ſtruck the child with a *ſmall cudgel* of which "*ſtroke* he *afterwards* died;" from which and from *Godbolt*'s report, which ſays the blow was with a wand, it may be concluded that the accident happened from *a ſingle ſtroke* with a cudgel, *not likely to deſtroy*, and that death did not *immediately* enſue. It was given in *heat of blood*, and not in *malice*, and therefore manſlaughter; but had it been given with a *deadly weapon*, or had there been *repeated blows*, it would have been murder. 12 *Rep.* 87. *Godb.* 182. 1 *Hale's P. C.* 453. *Cro. Jac.* 296. *Cro. Eliz.* 778. 5 *Burr.* 2799. *Lord Raym.* 144. 1491. 1 *Hawk. P. C.* 6 *edit.* 124, 125. *Foſt.* 294, 295. 316.

So in the KING *v.* ROWLAND PHILIPS, *Trinity*, 18 *Geo.* 3. It was ruled, that if an officer upon the impreſs ſervice fire, in *the uſual manner*, at the *hallyards* of a boat, in order to *bring her too*, and kill a man, there being no *malice*, it is only manſlaughter. *Coop.* 830.

Rule the Twenty-ſecond.

The firſt rule laid down, that words of reproach, nor indecent provoking actions, or geſtures of contempt, will not free the party killing from the guilt of murder, without an aſſault upon the perſon, will not hold in caſes, where from ſuch words or geſtures, or indeed upon any other ſudden provocation, the parties come to blows, *no undue advantage being ſought or taken on either ſide*. *Foſt.* 295.

As *A.* uſeth provoking language or behaviour towards *B. B.* ſtriketh him, upon which a combat enſueth, in which *A.* is killed. This was holden to be manſlaughter, for

for it was a ſudden affray, and they fought upon equal terms; and *in ſuch combats, upon ſudden quarrels, it mattereth not who gave the firſt blow.* 1 *Hale P. C.* 456.

But if B. had drawn his ſword and made a paſs at A. his ſword then undrawn, and thereupon A. had been killed, this would have been murder: for B. by making his paſs, *his adverſary's ſword undrawn*, ſhewed that he fought his blood, and A. endeavouring to defend himſelf, *which he had a right to do*, will not excuſe B. But if B. had firſt drawn, and forborn until his adverſary had drawn too, it had been no more than manſlaughter. *Kelyng* 61, 138. *Mawgridge's caſe.* 1 *Hawk. P. C.* 6 *edit.* 123. 2 *Ld. Raym.* 149. *Oneby's caſe.* 2 *Ld. Raym.* 1489. 2 *Strange* 771. *Kelyng* 119.

Rule the Twenty-third.

But in every caſe of homicide, upon provocation, however ſo great it be, if there is ſufficient time for *paſſion to ſubſide*, and for reaſon to interpoſe, ſuch homicide will be murder. *Foſter* 296.

For example. A. findeth a man in the act of adultery with his wife, and in the firſt tranſport of paſſion killeth him; this is no more than manſlaughter. But had he killed the adulterer deliberately and upon revenge, *after the fact had ſufficient cooling time* it had been undoubtedly murder: and in all caſes deliberate homicide, upon a principle of revenge is murder. 1 *Hale P. C.* 486. 1 *Ventr.* 158. *Sir Th. Raym.* 212. *Manning's caſe.*

Rule the Twenty-fourth.

On the above principle, deliberate duelling, if death enſueth, is murder. *Foſter* 297.

But if, as before laid down, upon a ſudden quarrel the parties fight upon the ſpot, or if they preſently fetch their weapons and go into the field and fight, and one of them falleth, it will be but manſlaughter; becauſe it may be preſumed the *blood never cooled. Ibid.*

But if they fight at ſuch an interval as that the paſſion might have ſubſided; or if from any *circumſtances* attending

ing the caſe, it may be reaſonably concluded, that their judgment had actually controuled the firſt tranſport of paſſion before they engaged, and one falleth, it will be murder. *The King v. Oneby.* 2 *Stra.* 773. 2 *Ld. Raym.* 1489, 1493.

Rule the Twenty-fifth.

Miniſters of juſtice, while in the execution of their offices, are under the peculiar protection of the law: and therefore the killing of officers ſo employed, hath been deemed murder, as being an outrage wilfully committed in defiance of the juſtice of the kingdom. *Foſt.* 308, 270. 1 *Hale P. C.* 457. *&c. Ante* 485.

This rule is not confined to the inſtant the officer is upon the ſpot, and at the ſcene of action, engaged in the buſineſs which brought him thither; for he is under the ſame protection of the law *eundo morando et redeundo*: and therefore if he cometh to do his office, and meeting with great oppoſition in the retreat he is killed, this will amount to murder. So if he meet oppoſition by the way and is killed before he cometh to the place, *ſuch oppoſition being intended to prevent his doing his duty, which is a fact to be collected from the circumſtances appearing in evidence*, this likewiſe will amount to murder. 1 *Hale P. C.* 463. *Foſter* 309.

Rule the Twenty-ſixth.

And every man who comes in aid of officers who are by the appointment of the crown conſervators of the peace; and every man lending his aſſiſtance for keeping of the peace, or attending for that purpoſe, whether commanded or not, is under the ſame protection as the officer himſelf. *Foſter* 309. 1 *Hale P. C.* 463. Vide *ca. 6. Ante* 485.

Rule the Twenty-ſeventh.

This protection, under limitations, reaches to private perſons interpoſing for preventing miſchief, in caſe of

an affray, or uſing their endeavour for apprehending felons, or thoſe who have given a dangerous wound. For thoſe people are in diſcharge of a duty the law requireth, and the law is their warrant, and they may be conſidered engaged in the public ſervice, for the advancement of juſtice. *Foſter* 309. *Ante* 561.

Rule the Twenty-eighth.

And if in the above caſes freſh ſuit be made, and a *fortiori*, if hue and cry be levied, all who join in aid of thoſe who began the purſuit, are under the ſame protection of the law, and ſtand on the ſame foot. *Foſter* 309, 310.

A robbery is committed; the country upon notice riſeth and purſueth the robbers, who turn and make reſiſtance, and one of the robbers is killed; this, on the part of the purſuers, is juſtifiable homicide. But if one of the purſuers is killed by the robbers, or any of them, it will be murder in the whole gang, *joining in ſuch reſiſtance*, whether preſent at the murder or at a diſtance; *but taking a part in ſuch reſiſtance*. The law is the ſame in the caſe of hue and cry duly levied. 1 *Hale P. C.* 464. *Foſter* 310.

Rule the Twenty-ninth.

The miniſters of juſtice in civil ſuits, under proper limitations, are intitled to the ſame protection for themſelves and followers, and upon the ſame principles of public juſtice. *Foſter* 310. Vide *ca.* 6. *Ante* 485.

FOSTER, in explanation of the foregoing rules obſerves, that with regard to miniſters of juſtice, who in right of their offices are miniſters of juſtice, and in that right alone interpoſe in riots or affrays it is neceſſary, in order to make the killing of them murder, that the parties concerned ſhould have ſome notice with what intent they interpoſe; otherwiſe the perſons engaged may imagine they came to take a part in the affray. But a ſmall matter will amount to a notification; as commanding the peace, or declaring the intent of interpoſing, or producing

ducing his ſtaff of office; or if the officer be within his proper diſtrict and *known*, or but generally acknowledged to bear the office he aſſumeth. In the night commanding the peace, or uſing words of like import notifying his buſineſs, will be ſufficient. *Kelyng* 66, 115. 1 *Hale P. C.* 460, 461. *Foſter* 310, 311. And Vide *Gordon's caſe*, *Ante* 488.

So in caſe of arreſts upon proceſs, whether by writ or warrant, if the officer named in the proceſs give notice of his authority, and reſiſtance be made and the officer killed, it will be murder, if ſuch notification was true, and the *proceſs be legal*. Private perſons interfering in affrays, muſt give expreſs notice of their friendly intent. *Foſter* 311. *Ante* 570.

By *legal proceſs*, whether by writ or warrant, is meant proceſs not defective in the frame of it, iſſuing in the ordinary courſe of juſtice, from a court or magiſtrate having juriſdiction in the caſe: and though there may have been error or irregularity in the proceedings previous to iſſuing of it, yet if the ſheriff or officer be killed in the execution of it, this will be murder; for he muſt, at his peril, pay obedience to it. And therefore on an indictment for ſuch murder, it is ſufficient to produce in evidence the writ and warrant, without ſhewing the judgment or decree. As in the *King* v. *Rogers*, *Cornwall aſſizes*, 1738, before lord *Hardwicke*. *See the King v. Taylor*. *Ante* 489. 9 *Co.* 68. a. 1 *Hale P. C.* 457. *Foſt.* 311, 312.

So in the caſe of a warrant from a juſtice of the peace, in a matter wherein he hath juriſdiction, the perſon executing ſuch warrant, is under the ſpecial protection of the law, though ſuch warrant may have been obtained by impoſition on the magiſtrate, and by falſe information touching the matters in it. The *King* v. *Richard Curtis*. *Foſter* 312. The *King* v. *Richard Baker*, on the execution of an attachment. *Leach Cr. Ca.* 3 *edit.* 131. 1 *Hale* 463. 1 *Stra.* 499. 6 *St. Tr.* 195. 9 *Co.* 66, 68. *Cro. Jac.* 280, 486. 10 *St. Tr.* 462. *Cowp.* 3. 1 *Hawk. P. C.* 6 *edit.* 129, 130.

But if the proceſs be defective in the frame of it, as if there be a miſtake in the name, or addition of the

perſon on whom it is to be executed, or if the name of ſuch perſon, or of the officer, be inſerted without authority, and after the iſſuing of the proceſs, or the officer exceeds the limits of his authority and be killed, this will amount to no more than manſlaughter *in the perſon whoſe liberty is ſo invaded.* 1 *Hale P. C.* 457. *Foſter* 312.

FOSTER examines the caſe of the *Queen* v. *Tooley*, and others, and concludes, that an illegal arreſt and impriſonment is not a juſtification for killing the officer ſo arreſting. *Foſt.* 312, *to* 316. 2 *Ld. Raym.* 1296.

In the caſe of private perſons uſing their endeavours to bring felons to juſtice, they muſt ſhew that a felony has been committed; for no *ſuſpicion* will bring the perſon interpoſing within the protection of the law, as above ſtated. 2 *Inſt.* 52, 172. *Cro. Jac.* 194. *Foſter* 318.

Suppoſing a felony to have been committed, but *not* by the perſon arreſted, or purſued upon ſuſpicion, this ſuſpicion will not excuſe the perſon arreſting or impriſoning, from the guilt of manſlaughter, if he killeth, or on the other hand, make the killing of him amount to murder. 1 *Hale* 490. *Foſter* 319.

But if A. being a peace-officer, hath a warrant from a magiſtrate for the apprehending of B. by *name*, upon a charge of felony; or if B. ſtandeth indicted for felony, or if the hue and cry be levied againſt B. by *name*, in theſe caſes if B. though innocent, flieth, or turneth, and reſiſteth, and in the ſtruggle or purſuit is killed by A. or any perſon joining in the hue and cry, the perſon ſo killing will be indemnified. And on the other hand, if A. or any perſon joining in the hue and cry, is killed by B. or any of his accomplices joining in that outrage, ſuch occiſion will be murder; for A. and thoſe joining with him were, in this inſtance, in the diſcharge of a duty the law requireth of them, and ſubject to puniſhment in caſe of a wilful neglect of it. *Ibid. Ante* 569.

Rule the Thirtieth.

In the execution of *civil* proceſs, the officer cannot juſtify the breaking open an outward door or window, for

for a man's houſe is his caſtle for ſafety and repoſe to himſelf and family, and he who breaks it, cannot be aiding in the diſcharge of his duty, in the inſtance in which he is committing a treſpaſs. But if he findeth the door open, or gaineth admiſſion from within, he having a lawful call to the place, cannot be a treſpaſſer in entering the houſe, and may break open inward doors, if he find that neceſſary to execute his proceſs. 2 *Roll. Rep.* 137. *Palm.* 52. 1 *Hale P. C.* 458, 459. *Cowp.* 1.

Rule the Thirty-firſt.

But if a ſtranger, whoſe ordinary reſidence is elſewhere, upon a purſuit taketh refuge in the houſe of another, as this is not *his* caſtle, he cannot claim the benefit of ſanctuary in it; neither has a *lodger* ſuch priviledge, for he is not the occupier of the houſe. 5 *Co.* 93. 2 *Hale P. C.* 117. *Foſter* 320. *Cowp.* 1. *Lee* v. *Ganſell.*

Rule the Thirty-ſecond.

But where a felony has been committed, or a dangerous wound given, or where a miniſter of juſtice cometh armed with a proceſs, founded on a breach of the peace, the party's own houſe is no ſanctuary for him. Doors, may in any of theſe caſes be forced, the notification, demand, and refuſal, before mentioned, having been previouſly made: but bare ſuſpicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony hath been actually committed; unleſs the officer cometh armed with a warrant from a magiſtrate, grounded on ſuch ſuſpicion. *Foſter* 320, 321.

Rule the Thirty-third.

Gaolers, and their officers, are under the ſame ſpecial protection that other miniſters of juſtice are; and they may give in evidence the ſame facts to juſtify or palliate; but if the death of a priſoner be owing to cruel and oppreſſive uſage on the part of the gaoler, or any officer of

of his, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress.

In CASTELL, widow, *v.* BAMBRIDGE *and* CORBET. Appeal of murder. *Hil.* 3 *Geo.* 2. *B. R.* A gaoler, knowing that a prisoner infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room. The second prisoner, who had not had the distemper, *of which the gaoler had notice*, caught the distemper and died of it. This was ruled to be murder. 2 *Stra.* 856. 9 *St. Tr.* 107. *Foster* 322.

And in the KING *v.* HUGGINS, *Mich.* 4 *Geo.* 2. *B. R.* Indictment for murder. It appeared in evidence that the deceased, a prisoner in the Fleet, was confined for a long time in a low, damp, unwholsome room, without being allowed the common necessaries of chamber-pot, &c. for keeping things sweet and clean about him; contracted an ill habit of body which brought on distempers of which he died, and this was holden to be murder in the party guilty of this duress. 2 *Lord Raym.* 1576. 2 *Stra.* 882. *S. C.* 1 *Barnard B. R.* 358, 396. *Fitzg.* 177. 9 *St. Tr.* 107. *Foster* 322.

CHAPTER XV.

Of Evidence to support an Indictment for Petit-Treason.

Rule the First.

EVIDENCE which is applicable to an indictment or appeal of murder, may also be applied to an indictment for petit treason, for both offences are to be considered as substantially the same, and murder is included in every charge thereof.

Rule the Second.

By stat. 25 *Edw.* 3. *sec.* 5. *c.* 2. no offences shall be adjudged petit treason, except in the following instances.

First,

First, where a *ſervant* kills his *maſter*. Secondly, where a *wife* kills her *huſband*. Thirdly, where an eccleſiaſtical man, ſecular or religious, kills his prelate, to whom he owes obedience. Therefore to ſupport an indictment for this crime, the relative ſituation of the priſoner to the party deceaſed, muſt be ſatisfactorily proved in evidence.

Rule the Third.

Evidence of procuring, aiding, or abetting, any of theſe offences, brings the party within the meaning of the ſtatute. 3 *Inſt.* 20, 21, 138. 1 *Hale P. C.* 379. *Dyer* 332. 1 *Hawk. P. C. ca.* 32. 7 *edit.*

Rule the Fourth.

If there be evidence that the fact was done upon a ſudden falling out, or in the party's neceſſary ſelf-defence, &c. it cannot be petit treaſon, in as much as all petit treaſon implies murder; and *vice verſa*, generally wherever the circumſtances are ſuch, as will make the killing of a ſtranger by a ſtranger murder, they make the killing or murder of a huſband or maſter petit treaſon. 1 *Hale. P. C.* 378, 380. *Dalis* 16. *Dalt. ca.* 91. *Cromp.* 19, 20. *Dyer* 254. 1 *Hawk. P. C. ca.* 32. 7 *edit.*

CHAPTER XVI.

Of Evidence to ſupport an Indictment on the ſtatute of Stabbing.

BY *ſtat.* 1 *Jac.* 1. *ca.* 8. if any perſon ſhall *ſtab* or *thruſt* any perſon that hath not then any weapon *drawn*, or that hath not firſt ſtriken the party killing, and the perſon ſo ſtabbed or thruſt die in ſix months; except in caſes of ſelf-defence, misfortune, or for preſerving the peace,

peace, or chaſtiſing his child or ſervant, ſuch offender, ſhall, &c. ſuffer death without benefit of clergy. *Iriſh.* 7 *Will.* 3. *ca.* 11. 3 *Stat. at large* 278.

Rule the Firſt.

In all caſes, where the evidence amount to juſtifiable or excuſable homicide, or barely to manſlaughter at common law, the juſtice or benignity of the common law hath over-ruled the rigour of the ſtatute *Foſter* 299.

Rule the Second.

Under the words *thruſt* or *ſtab* it hath been held, that *evidence* of ſhooting with any ſort of *fire-arms*, ſending an arrow out of a bow, a ſtone from a ſling, or uſing any device of that kind, *holden in the hand of the party*, at the inſtant of diſcharging it, or thruſting with a ſtaff, or other *blunt* weapon, will ſupport the indictment. But throwing at a diſtance, and wounding the party whereby death enſueth, the weapon being what it may, *being delivered out of the hand*, at the time the ſtroke was given, hath not been thought to come under the notion of ſtabbing or thruſting. 1 *Hale* 469, 470. *Foſter* 300.

As in the KING *v.* NEWMAN, *Old-Bailey*, *Octob.* 8 *Ann.* where the point of a ſword was thrown at twenty yards diſtance. *Foſt. in note*, 300.

Rule the Third.

An ordinary cudgel, or other thing proper for defence or annoyance, in the hand of the party, hath been conſidered as a *weapon drawn*, ſo as to take the caſe out of the ſtatute. 1 *Hale P. C.* 470. *Godb.* 154. *Aleyn* 43. 1 *Hale P. C.* 468. 2 *Hale P. C.* 344. *Styles* 86.

Rule the Fourth.

In all caſes of *doubt* and difficulty upon the conſtruction of the ſtatute, the benignity of the common law ought to turn the ſcale in favour of the priſoner. *Foſt.* 302. *Ante* 4.

CHAPTER

CHAPTER XVII.

Of Circumſtantial or Preſumptive Evidence, and how far it ſupports an Indictment.

THERE be three ſorts of preſumption, *viz.* VIOLENT, PROBABLE, LIGHT, OR TEMERARY.

Violenta preſumptio is many times *plena probatio; preſumptio probabilis* moveth little; but *preſumptio lævis ſeu temeraria* moveth not at all. *Co. Lit.* 6.

Theſe *preſumptions* are: *Firſt*, of LAW, which are neceſſary and abſolutely concluſive. *Secondly*, of FACT. There are preſumption of fact in *civil* and in *criminal* caſes; the laſt are the ſubject of this chapter.

Rule the Firſt.

If a man be found ſuddenly dead in a room, and another be found running out in haſte with a bloody ſword, this is a violent preſumption that he is the murderer: for the blood, the weapon, and the haſty flight, are all neceſſary concomitants to ſuch horrid facts: and the next proof to the ſight of the fact itſelf, is the proof of thoſe circumſtances that do thus indicate the facts. *Co. Litt.* 6. *b. S. P. C.* 179. *a.* 2 *Hawk. P. C. ca.* 12. *ſec.* 12. *ca.* 45. *ſec.* 7. *ca.* 46. *ſec.* 2. 1 *St. Tr.* 181. 3 *St. Tr.* 930.

In the KING *v.* THOMAS RADCLIFFE CRAWLEY, *at a commiſſion of oyer and terminer, Dublin, February*, 40 *Geo.* 3. The defendant was indicted for murder, and the evidence was *circumſtantial*, but ſo ſtrongly connected by facts, as to raiſe the ſtrongeſt *preſumption* of his guilt.

W. SMITH, B. obſerved, that in caſes of circumſtantial evidence, it is neceſſary that all the witneſſes be perſons of unimpeachable veracity, for it is poſſible the priſoner may be innocent of the crime. In caſes of circumſtantial evidence, there is great room for doubt, as to the guilt of the priſoner, and it is a principle in

law, that in every caſe of *doubt*, a jury ſhould lean to the merciful ſide and acquit. Vide CHAMBERLAINE, J. and MICH. SMITH, B. to this point. *Ante* 4, 5, 6.

This principle eſtabliſhed a great ground of diſtinction between civil and criminal law. Every thing is a doubt in a civil caſe, where the jury weigh the evidence, and having ſtruck a fair balance, decide according to the weight of the evidence. This, however, is not the rule in criminal caſes, for it is an eſtabliſhed maxim, that the jury are not to *weigh* the evidence, but in caſes of *doubt* to acquit the priſoner.

This humane principle of the law, however, is not to be perverted, in order to facilitate the eſcape of the offender. It is not a ſufficient ground to acquit that there is a *poſſibility* that the accuſed may be innocent of the charge, for there would be no end to poſſibilities. He was ſorry to ſay, but it was the truth of the aſſertion, that renders the ſituation of a jury ſo awful, that there is no caſe where a jury can procure *certainty*, from circumſtantial evidence, and that in every ſuch caſe the verdict of a jury is but on *conjecture*.

It would, notwithſtanding, be no ſufficient reaſon to acquit the priſoner, becauſe there is a *poſſibility* of his innocence. To acquit on ſuch ground, would be contradictory to the legal principle of circumſtantial evidence, for where that evidence is given, there is always a poſſibility of innocence.

It is right ſuch evidence ſhould go to a jury; and, particularly in the caſe of murder. In caſes of inferior perſonal injuries, there is a direct teſtimony of the injured individual; but in *murder*, which is generally committed in ſecrecy, there can be no teſtimony of the injured perſon, he is completely removed; it is neceſſary to bring the offender to juſtice, and therefore circumſtantial evidence ſhall be received.

As to *light preſumptions*, the BARON obſerved, there were many circumſtances which when firſt offered in evidence, only raiſe a *preſumption*, which the law calls light, and conſiders inſufficient to ground a conviction. Yet if the appearances ſo alter, and the facts given in evidence

evidence be not accounted for, the preſumption which at firſt was *light* will become *violent*, and ſuch as will afford a foundation for a verdict of conviction.

It was for the *jury* to inquire whether the laſt obſervation was applicable to the preſent caſe.

Character is of great weight in every caſe, and requires particular attention when the charge is grounded on circumſtantial evidence: it creates a greater degree of *doubt* than where the proſecution is ſupported by direct evidence. In the former caſe *character* ought to be particularly attended to, becauſe the jury is more or leſs embarraſſed and called upon to weigh the caſe with more ſcruple and doubt from the very nature of the teſtimony on the part of the crown.

Preſumption will become ſerious when the appearances are not accounted for by thoſe in whoſe power it is to account for them. At the ſame time ſhould the jury lay any ſtreſs upon the circumſtances given in evidence againſt the priſoner, they ſhould alſo lean to thoſe that are favourable to his caſe. He had the authority of the law to ſay, that though a man charged with an offence ſhould *fly*, that it is not concluſive evidence of guilt. The jury could not forget that one of the oaths they had taken was, whether the priſoner had fled in conſequence of the charge made on him; but though it ſhould be eſtabliſhed that he fled in conſequence of the charge, yet it did not follow of neceſſity that he was guilty of the murder; yet it was a circumſtance material, unfavourable, and ſuſpicious. *From the trial by Leon. Mac Nally, jun. p. 63.*

Rule the Second.

Recent poſſeſſion, eſpecially of goods not according to the circumſtances and habit of the life of the party charged is a *preſumption* againſt him. *The King v. Mahew, Bury ſpring aſſizes*, 1789. *Gilb. Evid. by Loft*, 898.

Rule the Third.

The introduction of a falſehood into the defence is a *preſumption* againſt the priſoner. This preſumption is heightened, if the falſehood is to be ſupported, as it almoſt neceſſarily muſt, by a witneſs conſcious of it. *The King v. Clark, per Groſe, J. Bury ſpring aſſizes,* 1789. *Gilb. Evid. by Loft.* 898.

Rule the Fourth.

Preſumptive evidence of *felony* ſhould be admitted cautiouſly, for the law holds, that it is better ten guilty perſons ſhould eſcape than that one innocent man ſhould ſuffer. 4 *Blackſ. Comm.* 352. 2 *Hale's P. C.* 289.

Rule the Fifth.

A defendant ſhould never be convicted for ſtealing the goods of a *perſon unknown*, merely becauſe they are found in his poſſeſſion, and he refuſes to give an account how he came by them; unleſs there are due proofs made that a felony was committed of theſe goods. 2 *Hale's P. C.* 290. 4 *Blackſ. Comm.* 352.

Rule the Sixth.

A defendant ſhould never be convicted of murder or manſlaughter, unleſs the fact of homicide be proved; or at leaſt the body found dead. 2 *Hale, P. C.* 290. 4 *Blackſ. Comm.* 352.

CHAPTER XVIII.

Of Evidence to convict the Mother of a baſtard Child, charged with concealing its birth.

" IF any woman be delivered of any iſſue of her body, " male or female, which being born alive, ſhould by the " laws

"laws of this realm be a baſtard, and that ſhe endea-
"vour privately, either by drowning or ſecret burying
"thereof, or any other way, either by herſelf or the
"procuring of others, ſo to conceal the death thereof as
"it may not come to light whether it were born alive
"or not, but be concealed; in every ſuch caſe the ſaid
"mother ſo offending ſhall ſuffer death, as in the caſe
"of murder, except ſuch mother can make proof by
"one witneſs at the leaſt that the child whoſe death was
"ſo intended to be concealed was born dead." *Stat.* 21 *Jac.* 1. *ca.* 27. *Iriſh. Stat.* 6 *Ann. ca.* 4.

Rule the Firſt.

If there be no concealment proved, yet it is left to the jury to inquire whether ſhe murdered her infant or not, by thoſe circumſtances that occur in the caſe, as if it appear by evidence that it was wounded or hurt, &c. but it doth not put her upon an abſolute neceſſity of proving it born alive by one witneſs, and ſo the *evidence* ſtands but at common law. *Hale, P. C.* 289.

Rule the Second.

If upon view it be teſtified by *one* witneſs, by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumſtances, this is taken to be a *proof*, that the child was born dead ſo as to leave it nevertheleſs to the jury, as upon common law evidence, whether ſhe were guilty of the death of it or not. *Ibid.*

The learned judge then ſtates his opinion on *preſumptive evidence*; for which vide *ante* 577.

The caſe of ANN DAVIS, *Newgate, Auguſt* 16, *Car.* 2. before KEYLING, C. J. lord BRIDGEMAN, C. J. and WYLDE, recorder of London, on an indictment for murdering her male baſtard child.

It was agreed by the judges, *Firſt*, That where there is evidence that a woman has endeavoured to *conceal* the death of her baſtard child, within the ſtatute, there is *no* need of any *proof* that the child was born alive, or that there were any ſigns of hurt upon the body, but it ſhall

ſhall be undeniably taken that the child was born alive and murdered by the mother. *Secondly*, That where a woman lay in a chamber by herſelf and went to bed without pain, and waked in the night and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it until the following night, yet ſhe was not within the ſtatute, becauſe ſhe knocked for help. *Thirdly*, That if a woman conſeſs herſelf with child before hand, and afterwards be ſurpriſed and delivered, no body being with her, ſhe is not within the ſtatute, becauſe there was no intent of concealment. And therefore, in ſuch caſes it muſt appear by ſigns of hurt upon the body, or ſome other way that the child was born alive. 2 *Hawk. P. C. ca.* 46. *Kel.* 32, 33.

BLACKSTONE obſerves, that this ſtatute favours pretty ſtrongly of ſeverity, in making the concealment of the death almoſt concluſive evidence of the child's being murdered by the mother; but it has of late years been uſual upon trials for this offence to require ſome ſort of *preſumptive* evidence that the child was born alive, before the other conſtrained preſumption (that the child whoſe death is concealed was therefore killed by its parent) is admitted to convict the priſoner. 4 *Comm.* 198, 352.

And this humane rule was followed on the trial of *Mary Mulhall*, convicted at the aſſizes for the *Queen's county*, before lord KILWARDEN, C. J. *ſummer*, 1800.

Barrington conſiders this ſtatute a law of ſeverity, as it ſubſtitutes *preſumption* of guilt in the room of *actual proof* againſt the criminal; but he ſuppoſes that it aroſe from the difficulty of proving the offence againſt the mother, rather than an intention to make a bare concealment ariſing from a miſtaken ſhame, amount to a capital felony. It muſt have frequently happened in theſe proſecutions that the child being found dead, perhaps in the mother's room, ſhe inſiſted upon its having been born in that ſtate of which no witneſs being able to prove the contrary, ſhe was of courſe acquitted. If the dead child, however, was found with any marks of violence upon it, he apprehends that this with other circumſtances might have proved the guilt, even at common law, without

out the intervention of this ſtatute; and the rather as no execution ſhould be permitted, unleſs the criminal convicted under this act would have been guilty of murder by the common law, as ſhe is otherwiſe to ſuffer merely from the *preſumption* ariſing from the circumſtance of concealment, of which it is believed there is no other in the Engliſh law. If this preſumption is by the ſtatute made the offence itſelf, ſhould it not be encountered by another natural and moſt ſtrong preſumption in favour of the criminal? That is to ſay, that the mother cannot be ſuppoſed to be the wilful author of the death of her new-born child, which by its cries entreats her protection and ſupport, and the father of which ſhe is probably as fond of as if ſhe had a right to call him by the name of huſband? And are not children born dead every day? and may not the mother in the agonies of child-birth be the involuntary occaſion of the infant's death? As to the circumſtance of diſpoſing of the body in places proper for its concealment, if the death is not received from the hands of the mother, it is but a natural conſequence of endeavouring to continue to bear a good character in her neighbourhood. *Barrington on the ſtat.* 402.

Doctor HUNTER ſays, that many pregnant women, under the apprehenſion of ſhame, become *inſane*, and commit ſuicide. That others, when the mind is overwhelmed with terror and deſpair, would deſtroy themſelves if they did not know that ſuch an action would infallibly lead to a diſcloſure of what they are anxious to conceal. In this perplexity, their diſtreſs of body and mind deprives them of all judgment, and they are delivered, *by themſelves*; ſometimes dying in the agonies of child-birth, and ſometimes being exhauſted, they faint, and become inſenſible of what is paſſing; and when they recover a little ſtrength, find that the child, whether *ſtill-born* or *not*, is *lifeleſs*. In ſuch a caſe, will not the beſt diſpoſition of mind urge the unfortunate woman to preſerve her character, by hiding every appearance of what has happened; yet if the diſcovery be made, that conduct will be ſet down as a proof of guilt.

After

After giving inſtances of pregnant women expiring in torture rather than confeſs their ſituation, he proceeds to examine the ſymptoms of violent death in the child. He inſtances various common and natural appearances both internal and external, *miſtaken* for marks of violent death.

In many caſes, he ſays, that to judge of the death of a child it may be material to attend accurately to the force of colliſion between the ſkin and the ſcarf-ſkin; and, ſtill more to be well acquainted with the appearance of the blood ſettling upon the external part of the body, and tranſcending through all the internal parts in proportion to the time that it has been dead, and to the degree of heat in which it has been kept.

When a child's head or face is ſwoollen, and red or black, the *vulgar*, becauſe hanged people look ſo, are apt to conclude that it muſt have been ſtrangled. But nothing is more common in natural births, particularly where the navel-ſtring happens to gird the child's neck; and where the head happens to be born ſome time before the body.

The material queſtion is, how far, in *ſuſpicious* caſes, may we conclude that the child was born alive, and probably murdered by its mother, if *the lungs ſwim in water?* *Firſt*, we muſt be aſſured that they contain air: then we are to find out if that air be generated by *putrefaction*. *Secondly*, we are to examine the other internal parts to ſee if they be emphyſematous or contain air, and we muſt examine the appearance of the air-bubbles in the lungs. If the air which is in them be that of reſpiration, the air-bubbles will be hardly viſible to the naked eye; but if the air-bubbles be large, or if they run in lines along the fiſſures between the component lobuli of the lungs, the air is certainly emphyſematous, and not air which has been taken in by breathing. *Thirdly*, If the air in the lungs be found to be contained in the natural air veſicles, and to have appearance of air received into them by breathing; let us next find out if that air was not blown into the lungs after the death of the infant. It is ſo generally known that a child born apparently dead may be brought to life by inflating its lungs,

lungs, that the mother herſelf or ſome other perſon, might have tried the experiment. It might even have been done with the moſt diabolical intention, of bringing about the condemnation of the mother! But the moſt dangerous error is this, *viz.* ſuppoſing the experiment to have been made, and that we have guarded againſt every deception, we may raſhly conclude that the child was born alive, and therefore probably murdered, eſpecially in a caſe where the mother had taken pains by ſecreting the child, to conceal its birth. This laſt circumſtance, which has generally great weight with the jury, cannot amount to more than ground for *ſuſpicion*, and therefore ſhould not determine a queſtion, otherwiſe doubtful, between an acquittal and an ignominious death.

Though in the caſe of a concealed birth, it be made out that the child had breathed, we ſhould not infer that it was murdered; it is a circumſtance, like the laſt, which amounts only to *ſuſpicion*, as appears from the following facts.

Firſt, if a child makes but one gaſp, and inſtantly dies, the lungs will ſwim in water as readily as if it breathed long and had been ſtrangled. *Secondly*, A child will very commonly breathe as ſoon as its mouth is born, particularly where there happens to be a conſiderable interval of time between what we may call the birth of the child's head, and the protruſion of the body; and if this may happen where the beſt aſſiſtance is at hand, it is more likely to happen where the woman is delivered by herſelf. *Thirdly*, We frequently ſee children born, who from circumſtances in their conſtitution, or in the nature of the labour, are but barely alive, and after breathing ſome ſhort time die in ſpite of all attention; and why may not that misfortune happen to a woman brought to bed by herſelf? *Fourthly*, Sometimes a child is born ſo weak, that if it be left to itſelf after breathing or ſobbing, it might probably die; yet may be rouſed by rubbing, &c. but in the caſes above conſidered, ſuch means of ſaving life are not to be expected. *Fifthly*, When a woman is delivered by herſelf, a ſtrong child may be born perfectly alive, and die in a very few minutes, either by lying upon its face in a pool, made

by the natural diſcharges, or upon wet clothes, excluding air, or drawn cloſe to its mouth and noſe by the ſuction of breathing. An unhappy woman delivered by herſelf, terrified, diſtracted, deſpairing, and exhauſted, will not have ſtrength, or collection enough, to fly inſtantly to the relief of the child. Thoſe facts deſerve ſerious conſideration, and when known, may be the means of ſaving ſome unhappy and innocent woman: for this reaſon Dr. *Hunter* originally publiſhed his eſſay, and the ſame reaſon has given this extract a place in this work.

CHAPTER XIX.

Of Evidence to ſupport an Indictment for Larceny.

Rule the Firſt.

TO ſupport an indictment for ſimple grand larceny, there muſt be *evidence* to ſhew a felonious and fraudulent taking and carrying away of perſonal goods, *not* from the perſon nor out of his houſe, above the value of twelve pence. 1 *Hawk. P. C. ca.* 33. *Dalt. ca.* 101. 1 *Hale P. C.* 503, 504.

All felony includes treſpaſs, and every indictment of larceny muſt have the words *felonice cæpit*, as well as *aſportavit*; from whence it follows, that if the party be guilty of no treſpaſs in taking the goods, he cannot be guilty of felony in carrying them away; for the taking muſt be *animo furandi*, and this *intent* muſt appear from the *evidence*. 1 *Hawk. P. C. ca.* 33. *Kelyng* 24. *Dalton* 3.

Therefore one that finds goods that are loſt, and converts them to his own uſe, *animo furandi*, is no felon: and a *fortiori* it muſt follow, that one who has the actual poſſeſſion of goods, by delivery, for a ſpecial purpoſe, as a carman, who receives them in order to carry them to a certain place, or a tailor who has them in order to make cloaths, or a friend who is intruſted with them

them to keep, cannot be ſaid to ſteal them, by embezzling them afterwards. 1 *Hawk. P. C. ca.* 33. 3 *Inſt.* 102. 1 *Hale P. C.* 504. 13 *Edw.* 4. 9, 10. *S. P. C.* 25.

Rule the Second.

But even thoſe who have the poſſeſſion of goods, by the delivery of the party, may be guilty of felony, by taking away part thereof with an intent to ſteal it.

As if the carrier open a pack and take out part of the goods; or a weaver who has received ſilk to work, or a miller who has corn to grind, take out part with an intent to ſteal it; in which caſe it may not only be ſaid, that ſuch poſſeſſion of a part, diſtinct from the whole was gained by wrong, and not delivered by the owner; but alſo that it was obtained baſely, fraudulently, and clandeſtinely, in hopes to prevent its being diſcovered at all, or fixed upon any one when diſcovered. 2 *Hawk. P. C. ca.* 33. 1 *Hale P. C.* 505. *S. P. C.* 25. 13 *Edw.* 4. 9, 10. *Dalt. c.* 102. *Keyling* 35.

So in the KING *v.* WILLIAM WYNNE, *Old-Bailey, April ſeſſ.* 1786. A box was left accidentally in the defendant's hackney coach; the coachman inſtead of returning it to the owner detained it, opened it, deſtroyed part of its contents, and pledged the reſt.

EYRE, B. obſerved, that no felonious intention could be ſuppoſed to exiſt in the mind of the defendant, at the moment the property was firſt acquired, and although the ſubſequent circumſtance of keeping it until it was advertiſed, was a breach of moral duty, it could not of itſelf be legally conſidered as a criminal converſion. But if from the evidence, the jury were ſatisfied in their conſciences, that he had opened the box, not merely from curioſity, but with an intention to embezzle any part of its contents, and that he had actually taken the goods, it would become a matter of legal conſideration whether it was felony. The jury found him guilty: and the JUDGES approved of the verdict. *Leach's Cr. Ca.* 3 *edit.* 460. *The King v. Sears, S. P. Ibid.* 463.

So in the KING *v.* MURRAY, *Old-Bailey, October ſeſſ.* 1784. If the clerk to a banker or merchant have the

care of money, or if he have access to it for special and particular purposes, and being sent to the bag or drawer where it is kept, and clandestinely takes out other money for his own use, such taking is felony. 1 *Vol.* 7 *edit. Hawk. P. C.* 209.

Rule the Third.

In general, where the delivery of the property is made for a certain special and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor.

Therefore in the KING *v.* WILLIAM BASS, *Old-Bailey, May sess.* 1782. It appeared in evidence, that the prisoner was servant to the prosecutor, and was sent with goods from his master's house to deliver them to a customer. In his way two men invited him into a public house, and persuaded him to open the package and sell the goods, and he received eight guineas to his own use. The JURY found him guilty; and the JUDGES were unanimous, that the conviction was proper, for the prisoner standing in the relation of a servant, the *possession* of the goods must be considered as remaining in the master, until, and at, the time of the unlawful conversion of them by the prisoner. The master was to have received the money for them from the customer, and he could at any time have countermanded the delivery of them. The prisoner, therefore, by breaking open the package tortiously, took them from the *possession* of the owner, and having by sale converted them *animo furandi* to his own use, the *taking* is *felonious*. *Leach's Cr. Ca.* 3 *edit.* 285, 286. *Kelyng* 35. Vide *Vale v. Bale. Cowp.* 294, 296.

So if a watchmaker steal a watch delivered to him to clean; or if one steal cloaths given for the purpose of being washed; or goods in a chest delivered with the key for safe custody; or guineas delivered for the purpose of being changed into half guineas; or a watch delivered for the purpose of being pawned; in all these instances the law has determined that the goods *taken* were taken *feloniously*

feloniouſly from the *poſſeſſion* of the *proprietor*. *The King v. Ann Atkinſon.* *Leach's Cr. Ca.* 3 *edit.* 339.

So if a carrier, after he has brought the goods to the place appointed, take them away again ſecretly *animo furandi*, he is guilty of felony, becauſe the poſſeſſion which he received from the owner being determined, his ſecond taking is in all reſpects the ſame as if he were a mere ſtranger. 1 *Hawk. P. C. ca.* 33. 3 *Inſt.* 107. *B. Cor.* 160. *S. P. C.* 25. 1 *Hale P. C.* 505.

Rule the Fourth.

And not only he who firſt *takes*, but in many caſes he who *receives* the goods from another, may be guilty of feloniouſly taking them.

As if a perſon intending to ſteal a horſe take out a replevin, and thereby have the horſe delivered to him by the ſheriff; or if one intending to rifle my goods, get poſſeſſion from the ſheriff, by virtue of a judgment, obtained without any the leaſt colour or title, by falſe affidavits, &c. in which caſes the making uſe of legal proceſs is ſo far from extenuating, that it highly aggravates the offence, by the abuſe put on the law, in making it ſerve the purpoſes of oppreſſion and injuſtice. 1 *Hale P. C.* 507. 3 *Inſt.* 108. *Kelyng* 43. 1 *Siderf.* 254. *Raym.* 276.

Rule the Fifth.

Alſo, he who ſteals my goods from J. S. who had ſtolen them before, may, on the evidence of thoſe facts, be convicted of having ſtolen them from me; becauſe, in judgment of law, the *poſſeſſion* as well as the *property*, always continued in me. 1 *Hawk. P. C. ca.* 33. *S. P. C.* 61, 182.

Rule the Sixth.

Where it is ſhewn by evidence, that the property taken has been obtained with a *preconcerted deſign to ſteal it*, the poſſeſſion is ſuppoſed to continue with the true owner,

owner, whatever may be the means or the pretence under which the property is obtained.

Therefore, where it appeared in evidence, that a perſon examined goods under pretence of buying, and runs away with them; or goes into a market, and obtains a horſe for the purpoſe of trying its paces and rides away with it, it is felony. *Raym.* 276.

Or as in the KING *v.* PEARS, *Old-Bailey, Sept. ſeſſ.* 1779. If a perſon hire a horſe to go to a particular place, and promiſe to return in the evening of the ſame day, but immediately ſells the horſe, and converts the money to his own uſe, this is felony. *Leach. Cr. Ca.* 3 *edit.* 253.

So in the KING *v.* SEMPLE, *Old-Bailey, July ſeſſ.* 1786. The defendant hired a poſtchaiſe for three weeks, to go a tour round the North, for the uſe of which it was agreed that he ſhould pay at the rate of five ſhillings a day during the time that he kept it. The price of the chaiſe was fifty guineas, and he went away with it, this was determined to be larceny, though the contract for hiring was not for any definite time. *Leach Cr. Ca.* 3 *edit.* 469, 470. *MS.*

So in the KING *v.* SHARPLESS and GREATRIX, *Old-Bailey, May ſeſſ.* 1772. The priſoner left a note at a hoſier's ſhop, deſiring that he would ſend ſome ſilk ſtockings to his lodgings to look at, and looked out three pair, and went away with them, while the hoſier, by his deſire, went home to fetch other goods, and on this evidence he was adjudged guilty of larceny; and the JUDGES held the conviction right, for the whole of the priſoner's conduct manifeſted an original and preconcerted deſign to obtain a tortious poſſeſſion of the property, and there was not a ſufficient delivery to change the poſſeſſion. *Leach Cr. Ca.* 108, 109. 1 *Show.* 55.

So in the KING *v.* AICKLES, *Old-Bailey, Jan. ſeſſ.* 1784. Indictment for ſtealing a bill of exchange. It appeared in *evidence*, that the priſoner undertook for the proſecutor, to procure for him caſh for a bill of exchange for one hundred pounds, and by that means got the bill into his poſſeſſion, with which he abſconded and appropriated the value of the bill to his own uſe. The priſoner's counſel argued, that to ſatisfy the definition of larceny, the

the property muſt be taken from the *poſſeſſion* of another; but the taking of the property after it is once ſeparated from the legal poſſeſſion of its original owner, cannot ſupport an allegation of larceny, eſpecially if the ſeparation be unaccompanied by thoſe ingredients which conſtitute a felonious intention. There is a diſtinction between actions committed *animo furandi* and thoſe by *artful contrivance*, and on this depends the great diſtinction between *felony* and *fraud*. In the preſent caſe there was no evidence of fraud, much leſs of felony, it could be no more than a breach of truſt, or violation of confidence. On the other ſide, caſes were cited to ſhew, that if the poſſeſſion was obtained with *intent to ſteal*, the delivery will not alter the poſſeſſion. The court left the caſe with the jury to conſider, *firſt*, whether they thought the priſoner had a *preconcerted deſign* to get the note into his poſſeſſion, with an *intent* to *ſteal* it? *ſecondly*, whether the proſecutor intended to part with the note to the priſoner without having the money paid before he parted with it. The JURY found the affirmative of the firſt queſtion, and the negative of the ſecond, and concluded the priſoner was guilty, and the twelve judges were of opinion with the jury, that the priſoner was guilty of felony. *Leach's Cr. Ca.* 3 *edit.* 340. *MS.*

So in the KING *v.* JOHN PATCH, *Old-Bailey, February ſeſſ.* 1782. The evidence was, that the priſoner, pretending to find a diamond ring of great value, obtained from the proſecutor a delivery of money as his portion of the value of the ring; the money being ſo obtained, with a deſign to take it away, under the falſe pretence that the ring was of great value, was a felonious taking from the poſſeſſion of the owner. *Leach's Cr. Ca.* 3 *edit.* 273, 274. *MS.* 354, 652, 730.

And in the KING *v.* HORNER, where the evidence was, that the proſecutor decoyed the priſoner into a public houſe, and introduced the play of cutting cards, and then under pretence of having won, ſwept the proſecutor's money into his hand and ran away with it. This was held a felonious taking. *Cald. Rep.* 295.

So in the KING *v.* WILKINS, *Old-Bailey, April ſeſſ.* 1789. The evidence was, that a tradeſman delivered a parcel

parcel of goods to his ſervant to carry to his cuſtomer, and the priſoner contrived to meet the ſervant on his way, and on pretence that he was going, by the directions of the cuſtomer to the maſter's ſhop, to fetch this parcel in lieu of another, obtained the delivery of it by exchanging it for a parcel of rags of no value, which he had purpoſely with him, it was determined by the JUDGES to be a felonious taking of the property from the poſſeſſion of the maſter. 1 *Hawk. P. C. ca.* 33. *ſec.* 22. 7 *edit.*

Rule the Seventh.

But if it appears in evidence that the horſe, chaiſe, or other property, was fairly and *bona fide* hired, or that the goods were really ſold, and a credit given to the party, or that the perſon actually played at cards on his own account and loſt the money, the property in ſuch caſes is *changed*, and the poſſeſſion of it out of the firſt owner, and therefore the *fraudulent converſion* of it afterwards cannot be felony; for to conſtitute larceny the *felonious deſign* muſt *exiſt* at the *time* the property was obtained.

This rule is illuſtrated in the KING *v.* CHARLEWOOD, *Old-Bailey, Febr. ſeſſ.* 1786. And the KING *v.* NICHOLSON, and others, *Old-Bailey ſeſſ.* 1794. *Leach's Cr. Ca.* 456, 457, 458.

Rule the Eighth.

The word "*aſportavit*" is neceſſary in every indictment for larceny; therefore there muſt be evidence of a *carrying away*. But proof of any the leaſt removing of the thing taken from the place where it was before, is ſufficient for this purpoſe, though it be not quite carried off. 1 *Hawk. P. C. ca.* 33.

Upon this ground, the gueſt who having taken off the ſheets from his bed, with an intent to ſteal them, carried them into the hall, and was apprehended before he could get them out of the houſe, was adjudged guilty of larceny. *Ibid.* 3 *Inſt.* 108. 2 *Ventr.* 215. 7 *Aſſ.* 39. *B. Cor.* 107. 3 *Inſt.* 109. 1 *Hale P. C.* 508. *Dalis* 21.

21. *Crom.* 36. *The King v. Clement Simpſon. Lent aſſ. Cambr.* 16 *Car.* 2. *Kelyng* 31. *in point.*

So alſo he, who having taken a horſe in a cloſe, with an intent to ſteal him, and being apprehended before he could get out of the cloſe, was held to be a felon. *Dalt.* 501. *Kelyng* 31.

So in the KING *v.* MARTIN, *Lent aſſ. Northampton*, 1777. It appeared in evidence, that the priſoner had pulled the wool from the bodies of ſixteen lambs, whilſt they were living; and in ſome places had torn the ſkin away. This removal of the wool from the lambs having been found *animo furandi*, the judges ruled it to be felony. *Leach's Cr. Ca.* 3 *edit.* 205.

So he who intending to ſteal plate, takes it out of a trunk and lays it on the floor and is ſurprized, this is evidence of aſportation, and is felony. *Kelyng* 31. 1 *Hale P. C.* 508.

So in the KING *v.* COSLET, *Old-Bailey, February ſeſſ.* 1782. The evidence was, that the priſoner got into the proſecutor's waggon, and laid hold of a parcel of currants, and had got near the tail of the waggon with them when he was apprehended. The jury found him *guilty*; but the court doubted whether this was a ſufficient *aſportation* to conſtitute larceny. The JUDGES were unanimous, that as the priſoner had removed the property from the ſpot, it was a ſufficient *taking and carrying away* to conſtitute the offence. *Leach's Cr. Ca.* 3 *edit.* 271, 272. *MS.*

And in the KING *v.* LAPIER, *Old-Bailey, May ſeſſ.* 1784. It was held, on a reſerved caſe, by all the JUDGES, that to force an ear-ring from the ear of a lady, ſo that it falls into her curls, is a ſufficient carrying away to conſtitute larceny. *Leach's Cr. Ca.* 3 *edit.* 360, 361. *MS.*

But where a man was indicted for ſtealing the contents of a bale of goods in a waggon, and the evidence was, that he had ſet it on its end, but had not removed it from the *ſpot*; it was ruled by the judges that was not a ſufficient carrying away. *Leach's Cr. Ca.* 3 *edit.* 272.

NOTE. Whatever evidence will ſupport an indictment for grand larceny, will be ſufficient to convict on a charge of petit larceny.

CHAPTER XX.

Of mixt or complicated Larceny from the perſon, which is of two kinds.

A FELONIOUS and violent taking away from the perſon of another, goods or money to any value, or putting him in *fear*, which is called robbery; but where there is no putting in fear is called LARCENY from the perſon.

Rule the Firſt.

To ſatisfy the word *cepit* in an indictment, there muſt be evidence of a taking away.

He therefore who receives the money of another, whilſt under the terror of an aſſault; or afterwards, while the party thinks himſelf bound in conſcience to give it to the aſſailant, by an oath to that purpoſe, which *in fear* he was compelled to take, is a taking as complete in contemplation of law, as if with his own hand he had taken it out of the party's pockets. 1 *Hawk. P. C. ca.* 34. *Dalt. ca.* 100. *Crom.* 34. 44 *Ed.* 3. 14. 4 *Hen.* 4. 3.

Rule the Second.

Neither can he who has once actually completed the offence, by taking the goods in ſuch manner into his poſſeſſion, afterwards purge it by any redelivery. 3 *Inſt.* 60.

As in the KING *v.* PEAT, *Old-Bailey, December ſeſſ.* 1781. The evidence was, that the priſoner ſtopped the proſecutor on Finchley-common, and demanded his money.

ney. The proſecutor delivered his purſe. The priſoner immediately returned it again, ſaying, "If you value "your purſe you will pleaſe to take it back and give me "the contents." The proſecutor received the purſe back, but while taking out the money, and before redelivery, a ſervant leaped from behind the carriage and ſecured the priſoner. A doubt aroſe, whether as robbery is only an aggravated ſpecies of *larceny*, there was a ſufficient ſpecies of *aſportation* in this caſe to conſtitute the offence. But the COURT held, that although the proſecutor did not eventually loſe either his purſe or his money, yet as the priſoner had in fact demanded his money, and under the impulſe of that threat and demand the property had been once taken from the proſecutor by the priſoner, it was in ſtrictneſs of law a ſufficient taking to complete the offence, although the priſoner's poſſeſſion had continued for an inſtant only. *Leach. Cr. La.* 3 *edit.* 266, 267.

For the outrage offered to the rights of ſociety does not vary in its nature, becauſe ineffectual in its conſequences: and the continuance of the property in the poſſeſſion of the robber is not required by law. *Eden's Prin. Pen. La.* 286. 3 *Inſt.* 69. *Staun. P. C.* 27. 1 *Hale, P. C.* 533.

Rule the Third.

But he who attacks me in order to rob me, but does not take my goods into his poſſeſſion, though he go ſo far as to cut off the girdle of my purſe, by reaſon whereof it falls to the ground, is not guilty of robbery; but puniſhable for a breach of the peace. 1 *Hawk. P. C. ca.* 34. 1 *Hale. P. C.* 532. *Dalt.* 100. *Cromp.* 34. But "to aſſault another with an intention to rob him," is now felony. *St.* 7 *Geo.* 2. *ca.* 21. *Iriſh.* 21 *Geo.* 2. *ca.* 12. *Stat. at large, vol.* 4. *p.* 856. *Poſt. Vide Index*, ASSAULT.

Rule the Fourth.

In ſome caſes there may be legal evidence of robbery where in truth the defendant never had any of the loſer's goods in his poſſeſſion. 1 *Hawk. P. C. ca.* 34.

As where I am robbed by ſeveral of one gang, and one of them only takes my money; in which caſe, in judgment of law, every one of the company ſhall be ſaid to take it, in reſpect to that encouragement which they gave to one another through the hopes of mutual aſſiſtance in the enterpriſe. Nay, though they miſs of the firſt intended prize, and one of them ride from the reſt and rob a third perſon in the ſame highway without their knowledge, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to aſſiſt one another in ſo doing. 1 *Haw. P. C. ca.* 34. 1 *Hale's P. C.* 533, 534, 337.

Rule the Fifth.

To ſupport an indictment for larcing from the perſon, the evidence muſt not only amount to a taking away, but muſt ſhew the taking to be from the perſon.

And under this rule, not only the taking away a horſe from a man whereon he is actually riding, or money out of his pocket, but alſo the taking of any thing from him *openly* and before his face, which is under his immediate and perſonal care and protection, may properly be ſaid to be a taking *from the perſon.* And therefore he who having firſt aſſaulted me takes away my horſe ſtanding by me; or having put me *in fear*, drives my cattle in my preſence, out of my paſture, or takes up my purſe, which in my fright I caſt into a buſh, or my hat which fell from my head, or robs my ſervant of my money before my face, may be indicted as having taken ſuch things from my perſon. 1 *Hawk. P. C. ca.* 34. 1 *Hale*, 533. *S. P. C.* 27. *Cromp.* 34, 35. *Dalt. c.* 100. 3 *Inſt.* 69. *Styles*, 156. *Salk.* 613. *Carth.* 145. *Strange*, 1015.

Rule the Sixth.

The taking muſt appear to be *ſubſequent* to the fear, for fear is the diſtinguiſhing ingredient between robbery and other larcenies. 2 *Inſt.* 68. 2 *Roll.* 154. 1 *Hale, P. C.* 535.

So ruled in the KING *v.* RICHARD MOSS, *Old-Bailey, May ſeſſ.* 1784. In evidence it appeared that the defendant

dant clandeſtinely ſtole a purſe, and, on its being diſcovered in his cuſtody, denounced vengeance againſt the owner if he ſpoke of it, and then rode away. The COURT held this taking to be *ſimple larceny* only, and not robbery, becauſe the *fear* excited by the menaces of the priſoner was ſubſequent to the ſtealing.

So where ſeveral men find another apparently intoxicated, and ſwearing he ſhall go home, they drag, abuſe, kick him, and clandeſtinely take his money, this is not *robbery*; for no demand is made of money, nor any *fear* excited for the purpoſe of obtaining it. 1 *Hawk. P. C.* 7 *edit. vol.* 1. 235.

Rule the Seventh.

The *evidence* muſt ſhew that the taking was *violent*, and therefore whenever a perſon aſſaults another with ſuch *circumſtances of terror* as put him into fear, and cauſe him by reaſon of ſuch fear to part with his money or other property, the taking thereof is *robbery*; whether there were any weapon drawn or not, or whether the perſon aſſaulted delivered his money or goods upon the other's command, or afterwards gave it to him upon his ceaſing to uſe force, and begging alms: for he was put into *fear* by his aſſault and gives him his money or goods to get rid of him. 1 *Hawk. P. C. ca.* 34 1 *Hale's P. C.* 533, 534. *Cromp.* 34. *Dalt. ca.* 100.

So in the KING *v.* GASCOIGNE, *Old-Bailey*, *October ſeſſ.* 1783. It was ruled, that if a conſtable, &c. by means of hand-cuffs or other violence, extort money from a priſoner in his cuſtody, this is robbery. *Leach Cr. Ca.* 3 *edit.* 313. 44 *Edw.* 3. *pl.* 14. 4 *Hen.* 4. *pl.* 3. *Staunf.* 27. *Kelyng* 43. 1 *Hale's P. C.* 507.

So as in the KING *v.* LAHIER, *Old-Bailey*, *May ſeſſ.* 1784. To ſnatch an ear-ring from a lady's ear, ſo that the ear is thereby torn through, is ſuch a taking by violence as conſtitutes *robbery*. *Ibid.* 360. *Ante* 593.

But, as in the KING *v.* BAKER, *Old-Bailey*, *Dec. ſeſſ.* 1783. To ſnatch a bundle of goods from the hands of another, ſo that no ſtruggle be made to keep them, is not ſuch a taking with force and violence as will conſtitute robbery. *Leach Cr. Ca.* 3 *edit.* 324.

And

And as in the KING *v.* KNEWLAND, *Old-Bailey, Jan. ſeſſ.* 1796. To obtain money by a threat to ſend for a conſtable, to take the party before a magiſtrate, and from thence to priſon, is not *robbery*; for the threat of legal impriſonment is not ſufficient alarm to induce a perſon to part with property. *Ibid.* 835.

Rule the Eighth.

But it is not neceſſary that the fact of *actual fear*, ſhould either be laid in the indictment, or be proved upon the trial; it is ſufficient if the offence be charged to be done *violenter et contra voluntatem.*

Foſter quotes the above as an opinion of lord *Holt's*, to which he implicitly accedes; and aſks, ſuppoſe the true man is knocked down, without any previous warning to awaken his fears, and lieth totally inſenſible while the thief rifleth his pockets, is not this a robbery? Yet where is the circumſtance of actual fear? Or, ſuppoſe the true man maketh reſiſtance, but is overpowered, and his property taken from him, by mere dint of ſuperior ſtrength, this doubtleſs is a robbery. And in caſes where the true man delivereth his purſe without reſiſtance, if the fact be attended without thoſe circumſtances of *violence and terror*, which in common experience are likely to make a man part with his property for the ſafety of his perſon, that will amount to a robbery. And if fear be a neceſſary ingredient, the law *in odium ſpoliatoris*, will *preſume fear*, where there appeareth to be ſo juſt a ground for it. *Foſt.* 128, 129. 4 *Black. Comm.* 243.

Rule the Ninth.

And if it appear upon evidence, that the taking from the perſon was attended with thoſe circumſtances of violence and terror, which in common experience are likely to induce a man to part with his property, againſt his conſent, either for the ſafety of his perſon, or the preſervation of his character and good name, it will amount to a robbery.

So

So in the KING *v.* DONNALLY, *Old-Bailey, February ſeſſ.* 1779. The honourable *Charles Fielding* gave in evidence a ſeries of facts, from which it appeared, that the priſoner meeting him in the ſtreet demanded a preſent, adding, "you had better comply, or I will take you "before a magiſtrate, and accuſe you of an attempt to "commit an unnatural crime." The jury found the priſoner *guilty;* and ſaid they were ſatisfied "that Mr. "*Fielding* delivered his money through *fear*, and under "apprehenſion that his life was in danger." The queſtion, "whether this offence amounts to robbery," was ſubmitted to the *twelve* JUDGES. *Counſel* were heard, and the JUDGES were unanimouſly of opinion, that the priſoner was guilty of *robbery* and properly convicted. *Leach Cr. Ca.* 3 *edit.* 229. *Jones's ca. ibid.* 164. *Hickman's ca. ibid.* 310.

Rule the Tenth.

If the *indictment* charge the robbery to have been committed *in the king's high-way*, and it appears, on *evidence*, to have been committed in a private footpath, or any other place, the offender ſhall have his clergy; notwithſtanding the *ſtat.* 23 *Hen.* 8. *ca.* 1. *Iriſh*, 11 *Jac.* 1. *ca.* 3. 1 *Stat. at large* 437. *The King v. Stokeman. Old-Bailey, May ſeſſ.* 1718. 1 *Hawk. P. C.* 7 *edit. ca.* 34. *ſec.* 3. *Moor* 16. 2 *Hale, P. C.* 349.

CHAPTER XXI.

Of Evidence to ſupport an indictment for feloniouſly taking Money, Goods, or Chattles from the perſon of any other, privately, without his knowledge. Stat. 8 *Eliz. ca.* 4.

Rule the Firſt.

As this ſtatute was intended to ſuppreſs a certain ſpecies of dexterity againſt the ſucceſs of which the common vigilance of mankind was found inadequate; therefore

fore if the larceny is in the ſlighteſt degree diſcovered at the time it is committing, the offender is not within the penalty of the act.

Rule the Second.

Alſo when it appears in evidence that the perſon loſing his property was ſo intoxicated by liquor as to be altogether ſenſeleſs, the offender ſhall have his clergy. *The King v. Gribbe, Leach, Cr. Ca. 3 edit. 275. The King v. Mary Reading, ibid.*

Rule the Third.

Though the contrary was formerly held, yet the judges have recently ruled that privately ſtealing from the perſon of a man while he is aſleep is within the ſtatute, and takes away clergy.

As where the proſecutor a maſter of a ſhip was robbed in his cabbin while he was aſleep privately and without his knowledge. So where a waggoner was ſleeping in the ſtable of an inn yard. *Thompſon's caſe. Leach. Cr. Ca. 498. Williams's caſe, ibid. 558. and the King v. Furnace, Old-Bailey, July ſeſſ. 1792.*

CHAPTER XXII.

Of Evidence to ſupport an Indictment for Burglary, which is the feloniouſly breaking and entering the Manſion-houſe of another, or the Walls or Gates of a Walled Town in the night, to the intent to commit ſome Felony within the ſame, whether the felonious intent be executed or not. 1 Hawk. P. C. ca. 38. 1 Hale P. C. 549. 3 Inſt. 63. 4 Blackſ. Comm. 223.

Rule the Firſt.

THE word "*noncanter*" is neceſſary in an indictment for this offence, and it cannot be ſatisfied in a legal ſenſe,

ſenſe, if it appear upon the evidence, that there was ſo much day-light at the time, that a man's countenance might be diſcerned thereby. *Dalt. c.* 151. 1 *Hawk. P. C. ca.* 38. *S. P. C.* 30. 3 *Inſt.* 63. *Saville* 47. *Cromp.* 32, 33. 7 *Co. b.* 34. 1 *Hale P. C.* 550. 9 *Co.* 66. 4 *Bl. Com.* 224. *Cro. Eliz.* 583. *Fuſſes's caſe.*

Rule the Second.

So alſo to complete this offence, there muſt be evidence not only of an *entry* but of a *breaking*; for the words "*fregit*" and "*intravit*" being both of them preciſely neceſſary in the indictment, both muſt be ſatisfied; and a *fortiorari* therefore there can be no burglary where ſuch evidence is wanting, as if upon the bare aſſault upon a houſe the owner throw out his money. *Dier* 99. *S. P. C.* 30. 3 *Inſt.* 64. 1 *Hale's P. C.* 551. 556. *Cromp.* 31. *Dalliſon* 22. *Pult.* 132. *Foſt.* 108. 1 *Hawk. P. C. ca.* 38.

Rule the Third.

Evidence of ſuch breaking as is implied by law, in every unlawful entry on the poſſeſſion of another, and will maintain a common indictment or action of treſpaſs, *quare clauſum fregit*, will not ſatisfy the words *felonice burglariter fregit*, except in ſome ſpecial caſes, in which it is accompanied with ſuch circumſtances as make it as heinous as an actual breaking. 1 *Hawk. P. C. ca.* 38. 1 *Hale P. C.* 508, 527, 551.

Thus, if a ſervant in the houſe, lodging in a room remote from his maſter, in the night time draweth the latch of a door to come at his maſter's chamber, with an intent to kill him. This, on ſpecial verdict, agreed by all the judges to be burglary. *Kelyng* 67. *and* Vide *Bayner's caſe, ibid. and Poph.* 84. *S. C. Hutton* 20. *Dyer* 99.

From the above rule it follows, that if one enter into a houſe by a door which he finds open, or through a hole which was made there before and ſteals goods, or draw any thing out of a houſe through a door or win-

dow, which were open before, or enter into a houſe by the doors, open in the day time, and lie there until night, and then rob and go away without breaking any part of the houſe, he is not guilty of burglary. 1 *Hawk. P. C. ca.* 38. 1 *Anderſ.* 114, 115. *Saville* 59. *Foſt.* 107.

But it is certain he would have been guilty thereof, if he had opened the window, or unlocked the door, or broke a hole in the wall, and then entered, &c. Or having lain in the houſe, by the owner's conſent, he had but unlatched a chamber-door, or if he had come down by the chimney, for that was inclöſed as much as the nature of the thing would bear. *Foſt.* 107.

On the principle of the above rule it hath been reſolved, that where divers perſons came to a houſe with an intent to rob it, and knocked at the door, pretending to have buſineſs with the owner, and being by that means let in, rifled the houſe, they were guilty of burglary.

So in LE MOTT's caſe; thieves came with an intent to rob Mr. Juſtice *Wilde.* Finding the door locked, pretending they came to ſpeak with him, a ſervant opened the door, and they entered the houſe and robbed. This being in the night, it was adjudged burglary; for the intention being to rob, and getting the door open by a *falſe pretence*, this was *in fraudem legis*, and was in law an actual breaking. *Kelyng* 43.

So on argument by the *Attorney-general (Toler)* and *Mac Nally* for the crown, and *Jonah Green* for the priſoner, it was ruled, that procuring the door to be opened in the night, by pretence of having a letter to deliver, or by any other device, if there be evidence to ſhew a preconcerted plan or intent to rob the houſe by that means, is burglary; though the party ſo entering be apprehended on entering the houſe by perſons waiting within ſide ſpecially for that purpoſe. *Commiſſ. oyer and terminer, Dublin*, 1799.

So if men pretend a warrant to a conſtable, or cauſe the *hue and cry*, and bring him along with them, and under that pretence rob the houſe, if it be in the night this is burglary. *Ibid.* 1 *Hale's P. C.* 552. 3 *Inſt.* 64.

And

And alſo in the KING *v.* CASEY and COTTER, *Old-Bailey ſeſſ. October*, 1666, it was ruled, that perſons taking lodgings and robbing the landlord at night, is burglary; for the law will not endure juſtice to be defrauded by evaſions. *Kelyng* 52, 63.

Rule the Fourth.

As to the entry, it ſeems that evidence of any, the leaſt entry, with the whole, or with but part of the body, or with any inſtrument or weapon, will ſatisfy the word "*intravit*," in an indictment for burglary. *Dalt.* 151. *Kelyng* 67. 1 *Hale's P. C.* 553, 555. 4 *Blackſ. Comm.* 245. 1 *Hawk. P. C. ca.* 38.

The KING *v.* GEORGE GIBBONS, *Old-Bailey, June ſeſſ.* 1752, *is in point.* It appeared in evidence, that the priſoner, in the night time, cut a hole in the window ſhutters of the proſecutor's ſhop, which was part of his dwelling-houſe, and putting his hand through the hole took out watches, but no entry was proved otherwiſe, and this was holden burglary. *Foſt.* 107, 108.

So proof that one do put his foot over a threſhold, or his hand, or a hook, or piſtol within a window; or turn the key of a door which is locked within ſide; or diſcharge a loaded gun into a houſe, it is evidence of an entry. 1 *Hawk. P. C. ca.* 38.

Rule the Fifth.

But the inſtrument muſt be introduced for the ſpecial purpoſe of committing the felony.

Therefore in the KING *v.* JOHN HUGHES, and others, *Old-Bailey, Decemb. ſeſſ.* 1785. It appeared in evidence, that the priſoner had bored a hole with an inſtrument called a *centre bit*, through the pannel of the houſe door, near to one of the bolts by which it was faſtened, and that ſome pieces of the broken pannel were found within ſide; but it did not appear that any inſtrument, except the point of the *centre bit*, or that any part of the priſoners bodies had been within ſide the houſe, or that the apperture made, was large enough to admit a man's hand.

The COURT were clearly of opinion, that this was a ſufficient *breaking*; but there muſt be both a breaking and an entering to conſtitute the burglary, and the breaking muſt be ſuch as will afford the burglar an opportunity of entering ſo as to commit the intended felony, or of introducing ſome part of his body, or ſome inſtrument proper for committing the felony. *Leach's Cr. Ca.* 3 *ed.* 452.

Rule the Sixth.

In ſome caſes a man may be guilty of burglary, who never made any actual entry at all.

As where divers come to commit a burglary together, and ſome ſtand to watch in adjacent places, and others enter and rob, &c. for in all ſuch caſes, the act of one is in judgment of law the act of all: it was a common cauſe with them, each man operated in his ſtation, at the ſame inſtant, towards the ſame common end, and the part each man took, tended to give countenance, encouragement and protection to the whole gang, and to inſure the ſucceſs of their common enterpriſe. 1 *Hawk. P. C. ca.* 38. 1 *Hale's P. C.* 439, 555. *Kelyng* 111. *Cromp.* 32. *Foſt.* 350, 353.

It has alſo been determined in the KING *v.* JOSHUA CORNWALL, *Mich.* 4 *Geo.* 2. that a ſervant who confederating with a rogue lets him in to rob a houſe, &c. is guilty of burglary, as much as the rogue himſelf. 1 *Stra.* 881. *Dalt.* 151. 1 *Hale* 555. 1 *Hawk. P. C. ca.* 38. 10 *St. Tr.* 433. *S. C.*

Rule the Seventh.

It is enacted, "That if any perſon ſhall enter into the "manſion, or dwelling houſe of another, by day or by "night, without breaking the ſame, with an intent to "commit felony, or being in ſuch a houſe, ſhall com-"mit any felony, and ſhall in the night time break the "ſaid houſe, to get out of the ſame, ſuch perſon is, and "ſhall be taken to be guilty of burglary, and ouſted of "the benefit of clergy, in the ſame manner as if ſuch "perſon had broken and entered the ſaid houſe in the "night

" night time, with an intent to commit felony there." *Stat.* 12 *Anne ca.* 2.

With regard to cupboards, preſſes, &c. they being merely moveables, breaking them is not evidence of burglary. *Foſt.* 109.

Rule the Eighth.

Whatever kind of entry will make a man guilty of burglary at common law, will be ſufficient evidence to bring the caſe within the ſtatutes againſt houſe-breaking, attended with larceny in the day time. *Stat.* 1 *Edw.* 6. *ca.* 12. *ſec.* 10. 39 *Eliz. ca.* 15. *Foſt.* 108.

CHAPTER XXIII.

Of Evidence neceſſary to ſupport an Indictment for ARSON, *or the maliciouſly and voluntarily burning the Houſe of another, by night or by day.*

Rule the Firſt.

NEITHER evidence of the bare *intention* to burn a houſe, nor even an actual *attempt* to do it, by putting fire to part of a houſe, will amount to felony, if no part of it be burnt, for the indictment muſt have the words, *incendit et combuſſit.* But if any part be burned, though the fire afterwards go out, or be put out, it ſupports the indictment. 1 *Hawk. P. C. ca.* 39. 1 *Hale's P. C.* 570. *Dalt.* 105. 3 *Inſt.* 66. 4 *Blackſ. Comm.* 222.

Rule the Second.

The houſe deſcribed in evidence, muſt be the ſame kind as that named in the indictment.

Therefore in the KING *v.* SARAH TAYLOR, *Lent aſſ. Rocheſter,* 33 *Geo.* 2. The priſoner was indicted for having burned a certain out-houſe, called a *paper-mill,* and it appeared that only a large quantity of paper that was drying on a loft, annexed to and belonging to the mill was ſet fire to, but that no part of the mill was ſet fire to or conſumed, the evidence was held inſufficient. *Leach Cr. Ca.* 3 *edit.* 58.

CHAPTER

CHAPTER XXIV.

Of Evidence to ſupport the charge of a crime againſt Nature; of Rape; of having carnal knowledge of an Infant; and of forcible Marriage.

Rule the Firſt.

IN every indictment for ſodomy or beaſtiality, there muſt be the words *rem habui veneream, et carnaliter cognovit;* wherefore to make a *rape* there muſt be an actual penetration, or *res in re* proved, as alſo in buggery. Therefore *emiſſio ſeminis* is indeed an evidence of penetration, but ſingly of itſelf, it makes neither rape nor buggery, but it is only an attempt of rape or buggery. 3 *Inſt.* 59.

HALE, ſays, but the *leaſt* penetration maketh it rape or buggery; although there be not *emiſſiori ſeminis*, and therefore lord *Coke* muſt be wrong, and contradicts what he ſays in his Pleas of the Crown; and beſides, it is poſſible a rape may be committed by ſome *quibus virge erecto adſit et emiſſio ſeminis ex quodam defecta deſit.* 1 *Hale's P. C.* 630.

Rule the Second.

Of late years it has not been cuſtomary to preſs a woman to give evidence of the above particulars; and it has been held ſufficient if the proſecutrix ſwear, that the defendant had carnal knowledge of her perſon, againſt her conſent; or carnal knowledge of her body as her huſband had. *The King v. Lidwell, Eſq. Spring aſſi. Naas*, 1800, before lord CARLTON, C. J.

Rule the Third.

It is ſtrong, but not a concluſive preſumption againſt the proſecutrix, that ſhe made no complaint in a rea-

ſonable

dence as a juſtification; unleſs the blow be in a church or church-yard, &c. *Ibid.* 6 *Mod.* 172, 230, 263. 4 *Blackſ. Comm.* 145, 216. 11 *Mod.* 43, 52. 2 *Salk.* 642. 1 *Lord Raym.* 177. 1 *Siderf.* 246. *Holt* 699. *Cro. Jac.* 307. *Cro. Car.* 467. *Wynne's Eunomious, vol.* 3. 46, 47.

Rule the Fourth.

It is enacted, that if any perſon, with an offenſive weapon or inſtrument, unlawfully and maliciouſly ſhall aſſault; or ſhall by menaces, or in or by any forcible and violent manner, demand any money, goods, or chattles, of or from any perſon or perſons, with a felonious intent to rob, he ſhall be tranſported. *Stat.* 7 *Geo.* 2. *ca.* 21. *Iriſh.* 21 *Geo.* 2. *ca.* 12. 6 *Stat. at large* 856.

On which ſtatute it has been ruled, that to complete the crime, not only an *aſſault*, as by holding a piſtol towards a coachman, and telling him to ſtop, but a *demand* of the money or other property, muſt be proved. 1 *Hawk. P. C. ca.* 55. *Peter Parfait's caſe, Old-Bailey, ſeſſ.* 1740. *Haward's caſe, Old-Bailey,* 1783. *Leach Cr. Ca.* 3 *edit.* 23.

Rule the Fifth.

The evidence muſt ſhew, that both the *aſſault* and the *demand* were made upon the perſon intended to be robbed. *Thomas's caſe, Old-Bailey, July ſeſſ.* 1784. *Leach Cr. Ca.* 372.

Rule the Sixth.

The evidence muſt ſhew, that the aſſault was made with an offenſive weapon, of the ſame kind as that which is laid in the indictment: or that a demand was made of goods. *Jackſon's caſe, Old-Bailey, April ſeſſ.* 1783. *Leach Cr. Ca.* 3 *edit.* 303. *The King v. Remnant.* 5 *Term. Rep.* 169.

CHAPTER XXVII.

Of Evidence admiſſible to ſupport an Indictment for a Conſpiracy, of High Treaſon, or Conſpiracies to commit other Offences.

Rule the Firſt.

EVIDENCE may be given of a treaſonable conſpiracy, at any time *before* or *after* the day alledged in the indictment.

As in the KING *v.* CHARNOCK, and KEYS, *Old-Bailey, March*, 8 *Will.* 3. 1695, before HOLT, C. J. and TREBY, C. J.

Charnock, one of the priſoners, objected to evidence being received of any fact done the *preceding* year, as nothing was mentioned in the indictment of that year.

HOLT, C. J. The day is *not material*, it is only a circumſtance, but in *form* ſome day before the indictment is preferred muſt be laid; and though the day laid in the indictment is the tenth of February, yet it is alſo ſaid, that the things contained in the indictment were done likewiſe at divers days and times, as well before as after; and ſo the indictment comprehends even what might be done the laſt year as well as this. Neither are the witneſſes tied up either to the particular *time* or *place* mentioned in the indictment, ſo it be *within the county*, and *before* the indictment preferred. All that is to be regarded is, that no evidence can be given or admitted, of any other ſpecies of treaſon, but what is contained in the indictment; for a man may certainly be indicted for a treaſon committed *this* year, and upon his trial evidence may be given of the *ſame* treaſon committed the year before. And the reaſon is good, for the treaſon conſiſting in imagining and compaſſing the king's death, which may be manifeſted by diverſe overt-acts, ſome *before*, ſome *on*, and others *ſince*, the tenth of February, (the day laid) yet they are *evidence* of *one* treaſon,

which

which is the compaſſing the king's death. It matters not how far back the conſpiracy reaches, or did begin, if it was afterwards purſued, proof may be given of it; and this is not unuſual, and the common law is plain on it. 4 *St. Tr.* 570. *Ante* 496.

Rule the Second.

The exiſtence of a conſpiracy being proved, the act of any one man engaged in ſuch conſpiracy, though *not* on his trial, is evidence to criminate thoſe with whom he co-operated, though they are not on trial.

But the *declarations* of a perſon unconnected with the defendant on trial, except as he may at particular occaſion be in his company, cannot in any caſe be received in evidence.

In lord STRAFFORD's caſe, 32 *Car.* 2. the *evidence* was arranged in two parts, *general* and *particular*. The general evidence to ſhew the univerſal *conſpiracy*; the particular to ſhew what ſpecial part the priſoner had in that conſpiracy. Accordingly witneſſes were produced, firſt to prove the exiſtence of the plot charged in the impeachment, and were permitted to ſtate facts of the conſpiracy that took place both in England and abroad; and the exiſtence of the conſpiracy being thus eſtabliſhed, then, facts perſonally applicable to the priſoner were given in evidence. 3 *St. Tr.* 109.

So in lord LOVAT's caſe, 20 *Geo.* 2. 1746-7. The firſt claſs of evidence was arranged to ſhew the ſcheme of rebellion began and carried on, for bringing over the Pretender, by aid of foreign force; the ſecond included evidence of the more immediate ſcene of action, and the *particular* part the priſoner took in it. 9 *St. Tr.* 615, 630.

In the KING *v.* THOMAS HARDY, high treaſon, *ſeſſions-houſe, Old-Bailey, October and November*, 39 *Geo.* 3. *James Davidſon*, a printer, depoſed that Mr. *Thelwell*, (indicted for treaſon with *Hardy*, but not on trial) brought a manuſcript to him and *deſired* him to print it.

Erſkine, for the priſoner, objected, that what *Thelwell* ſaid was not evidence againſt *Hardy*.

Garrow inſiſted, that after having proved a connection and conſpiracy between *Thelwell* and the priſoner, all the acts of *Thelwell*, or any other perſon againſt whom evidence had been given, of acceſſion to the general plan of conſpiracy, was clearly evidence againſt every man charged with that conſpiracy.

Erſkine admitted there was no doubt that upon an indictment for a conſpiracy, be the conſpiracy to do one act or another, or be the quality of the act done, when it is done, what it may, that as far as perſons are connected acting together towards one purpoſe, which purpoſe conſtitutes the crime, they may be involved together by evidence; but that is not the queſtion here, and the court will not allow it to be aſked, whether *Thelwell* did direct him to print that paper, *Hardy* not being *preſent*.

Eyre, C. B. ſaid, This purports to be a paper containing a reſolution at a general meeting of the London Correſponding Society; it is brought to the printer by one of the members of that ſociety, the priſoner being another member of that ſociety, acting in that ſociety as the ſecretary, and this being a printed paper produced by one of them, it does ſeem to me that in a general charge of a *conſpiracy*, this is evidence to prove a circumſtance in that conſpiracy: whether it will be ultimately ſo brought home to the priſoner *Hardy*, as that he ſhould be reſponſible for the guilt of having publiſhed it, may be another conſideration; but that it is a branch of the conſpiracy, and a circumſtance occurring in it, the import of the paper plainly proves. *Hardy's trial, (Gurney's edit.) vol.* 1. 345, 6 & 7.

In the ſame caſe, *Garrow* ſubmitted that having proved *Thelwell* a member and agent of the Correſponding Society, the crown was entitled to give in evidence againſt *Hardy* a letter from *Thelwell*, purporting to have contained ſeveral of the ſocieties addreſſes and ſeditious ſongs compoſed and ſung by *Thelwell* at their meetings; and that any act of *Thelwell's* ſo in furtherance of the conſpiracy, was evidence againſt the defendant.

Erſkine. It appears *Thelwell* was an agent for the publication of this addreſs, which turns out to be an act

of

of the ſociety: what an agent *does* is one thing, but what an agent *ſays has been done* is another thing; therefore what *Thelwell* has ſaid is not evidence againſt *Hardy*. Many may meet for objects which they may all league in and be connected together; and if criminal, all criminal. But the *declaration* of one man, ſuppoſing he drives at any particular object, and makes uſe of any particular language to expreſs his mind, with regard to that object, cannot be evidence. As far as all the acts of the ſociety are given in evidence, as far as any thing has been ſaid in the *preſence* of *Hardy* at meetings he attended, all theſe are evidence againſt him; and ſo is every thing that *Thelwell* does in this partial agency; for he is not eſtabliſhed to be the univerſal agent of *Hardy*, but only particular agent for procuring the printing of a particular paper.

Gibbs, ſame ſide.—The queſtion is, whether *Hardy* has compaſſed the king's death, and whether he has done any of the acts charged in the indictment as overt-acts in the proſecution of that deſign. The evidence offered is, that *Thelwell*, who is in the ſame indictment with *Hardy*, not by any communication with *Hardy*, not in conſequence of any pre-concerted ſcheme between him and *Hardy*, did write this letter. Now with reſpect to any thing that paſſed at the meeting at which *Hardy was*, with reſpect to any thing that was done by any other perſon directed and inſtructed by *Hardy* to do that thing, we admit that thoſe things which paſſed at the ſociety in *Hardy*'s preſence, and that any thing which was done by another perſon by the direction of *Hardy* could be evidence againſt *Hardy*; but to what point in the indictment the letter written by *Thelwell*, which it is not proved *Hardy* ever had any knowledge of, does not appear.

The three queſtions are, firſt, whether *Hardy* compaſſed the king's death; ſecond, whether he committed any of the acts which were ſtated as overt-acts; and third, whether he committed them in the proſecution of a deſign upon the king's life. He ſubmitted that a letter written by *Thelwell*, without the knowledge of *Hardy*, could not be *evidence* of the act of *Hardy*'s mind, therefore it could not be evidence on the firſt ground.

With

With reſpect to the exiſtence of the acts that are laid as overt-acts, they muſt be proved ſpecifically upon all the priſoners in the indictment. The preſent trial is only of *Hardy*. The preſent queſtion is, whether he did any of theſe acts. Then the *declaration* of another man, whether by word of mouth or by letter, cannot prove the fact upon *Hardy*.

Then ſuppoſe the acts proved, the third thing to be proved is, that the act was done in the proſecution of a deſign upon the king's life; then nothing that is ſaid, written, or done by a *third* perſon, without the authority of *Hardy*, can prove that *Hardy* meant to produce the effect that is imputed to him, namely the deſtruction of the king. Therefore this letter written by *Thelwell* does not appear to conduce to the proof of either of the three things imputed by this indictment; namely, that he compaſſed the king's death, that he in point of fact committed any of the acts ſtated in the indictment as overt-acts of that deſign; or ſuppoſing that he committed them, that any of theſe acts were directed to the deſign of compaſſing the king's death. Upon neither of theſe grounds is this letter admiſſible againſt *Hardy*, and therefore ought not to be received in evidence.

EYRE, C. J. C. P. I agree that where ſeveral perſons are proved to be engaged in one general conſpiracy, all the tranſactions of that conſpiracy, by the different parties, may and ought to be given in evidence; and it is enough if the party accuſed at this time can be proved to be privy to that general conſpiracy; for if that is proved, every thing that is done by the different parties concerned muſt be alſo imputed to him as a part of the tranſaction of that conſpiracy. This letter is no more than *Thelwell*'s account to a private friend of a part which he had taken reſpecting this paper, and of his having compoſed ſongs; and another paſſage in it is very material, as againſt *Thelwell*; but, in my mind, ſhould be reſerved until it comes to the time when *Thelwell*'s own declarations come to be proper evidence.

I doubt whether we ought to conſider this private letter as any thing more than *Thelwell*'s declaration; and

Thelwell's

Thelwell's declaration ought not to be evidence of any thing which, though remotely connected with this plot, yet ſtill does not amount to any tranſaction done in the courſe of the plot, for the furtherance of the plot; but is a mere recital of his, a ſort of confeſſion of ſome part that he had taken. That is not like the evidence which we before admitted of a fact done by *Thelwell* in carrying the papers and delivering them to the printer, which is a part of the tranſaction itſelf. His account of that tranſaction ſtands upon a different footing. It ſeems juſt the ſame as an act which ſhall bind a man becauſe he is connected with the perſon that did the act; and his *declaration*, which ſhall *not* bind him, becauſe it is no part of the act.

BULLER, J. There are two things to be conſidered in an indictment of this ſort—*Firſt*, whether any conſpiracy exiſts; *next*, what ſhare the priſoner took in that conſpiracy. When we are conſidering the firſt queſtion, any thing that paſſed from any perſon who is proved to be a party in the conſpiracy ought to be received in evidence, and it is received for the purpoſe of ſhewing what was the *extent* and *nature* of the conſpiracy. Now if the caſe ſtood merely upon this ground, that *Thelwell*, one of the conſpirators, had ſaid, their object was ſo and ſo; that would be evidence. In *Damaree* and *Purchaſe*'s caſe, evidence was received of what ſome of the party had done when the priſoner was not preſent. The attorney-general ſays: "I call this witneſs, not to "ſpeak in particular of the priſoner, but to ſhew the "*intention* of the mob." On the trial of lord *Southampton*, ſomething ſaid by lord *Eſſex*, previous to the priſoner's being there, was admitted in evidence. In lord *George Gordon*'s caſe, evidence of what different perſons of the mob had ſaid, though he was not there, was admitted. In all the caſes at St. *Margaret's-hill*, 1800, the ſame thing was admitted, and with a view of ſhewing *what was the deſign* then on foot, which is a very diſtinct queſtion from the queſtion of whether the priſoner was or was not concerned in the extent that others might have been. This letter ſeems to have that effect; for it ſhews what ſome of the parties at leaſt *intended* by meetings

they

they had held, and what they propoſed to effect. In that light, therefore, it ſeems to be evidence. But before it can affect the priſoner materially, it is neceſſary to make out another point, namely, that he conſented to the extent that the others did; but ſtill while we are upon the queſtion as to the deſign, any thing that has been *ſaid*, ſtill more any thing that has been *written* by the conſpirators, ought to be received in evidence to prove what the deſign was.

GROSE, J. concurred with BULLER.

MAC DONALD, C. B. and HOTHAM, B. were of opinion with EYRE.

EYRE, C. J. In the caſes of *Damaree* and lord *George Gordon*, the cry of the mob at the time made a *part* of the *fact* of the tranſaction, therefore ſuch evidence ought to be received. Correſpondence very often makes a part of the tranſaction, the correſpondence of a man who is a party in a conſpiracy, would undoubtedly be evidence; correſpondence is furtherance of the plot; but a correſpondence of a *private nature*, a mere *relation* of what has been done is a different thing. *Hardy's tr. (Gurney's edit.) vol.* 1. 360 *to* 369.

In the ſame caſe—

Garrow, for the crown, propoſed to read a letter upon the principle of its being a correſpondence between one of the perſons proved to have been a party in the conſpiracy, and another perſon at a diſtant part of the kingdom, likewiſe proved to be a party in the conſpiracy. It was a letter from *Martin* to *Margarot*, at that time in cuſtody in the Talbooth, *Edinburgh*, having been committed as a member of the Britiſh convention. This letter, he ſtated, to be in terms calculated to excite the Northern people, by the doctrines which had been diſſeminated in *London*.

Erſkine. This is an indictment for compaſſing and imagining the death of the king, and there are overt-acts ſtated in the indictment, laid as acts to fulfil the traitorous *intention*, which is the charge upon the record. It is inſiſted, that theſe acts involve in themſelves a forcible ſubverſion of the government of the country, which would

would involve in it, as a conſequence, the death of the king, and that therefore it is an overt-act, or, in other words, relevant evidence to prove the *criminal intention*, which is the ſubject matter of this indictment. The law certainly permits any other *acts* of the priſoner to be given in evidence which decypher his mind, any thing he has *ſaid*, any thing that he has *done*, which point directly and relevantly to the purpoſe of this indictment: but the court will ever recollect, that the crime charged upon the record, is the compaſſing the death of the king, and that the overt-act is the means the defendant is charged to have made uſe of, in the accompliſhment of that criminal purpoſe.

Let us ſee the danger of allowing the letter of a man to be read, who is not charged upon this record as a conſpirator with the priſoner. We ſay, any thing that *Martin* ſays or writes, can, upon no principle of common ſenſe, be conſidered as evidence to criminate any body, even though he be proved a member of the correſponding ſociety. Take him as a member for the ſake of argument, upon what principle can the court go out of the overt-act charged in the indictment? upon what principle can the court go beyond evidence of the direct conſpiracy charged upon the defendant, but upon this wholeſome principle which we do not contradict, namely, that any thing which can decypher the mind of the priſoner to the jury, from whence they can collect that he intended the death of the king, may be evidence againſt him; then, according to that, any members of the correſponding ſociety, brought together where *Hardy* was, not ſpeaking of the king, or attempting any thing that could lead to his majeſty's death, would make him anſwerable for every wicked thing that any man has ſaid, or any man has written. If *Martin* expreſſes himſelf in a contemptuous mannerof the king, or of his parliament, it may be evidence to decypher the mind of *Martin*, but not the mind of *Hardy*.

Where is this attempt at evidence to ſtop? if *Martin* is to be conſidered the decypherer of the mind of *Hardy*, then *Hardy*'s counſel muſt enter into a defence of the mind of *Martin*; they muſt call witneſſes to his cha-

racter. Will you go the length of making a declaration of *Martin*'s contemptuous behaviour towards the king, evidence not only to ſhew that he thought lightly of the king, but that every other man did, who met for another purpoſe and for another end?

As the priſoner ſtands accuſed of compaſſing the death of the king, every thing he has done himſelf, every thing done in his preſence, every thing ſaid in his preſence, to which he may be ſuppoſed to aſſent, by continuing to meet the ſame perſons again, is to be received in evidence. Suppoſe, inſtead of being a letter to *Margaret*, it had been a letter to *Hardy* himſelf, it would not be evidence. I cannot help a man's writing and ſending a letter to me; but I may diſapprove the contents, and ſhall this be evidence againſt me? if this letter be read, *Martin* of courſe muſt be allowed to explain it. If the crown can give the letter in evidence, becauſe *Martin* happened to be a member of the London correſponding ſociety, the correſpondence of all the affiliated ſocieties, and every man in them may be read, and the priſoner in turn, muſt be allowed to produce the letters of all the members of theſe ſocieties. Therefore, on principle of law, this letter cannot be read, unleſs it be ſhewn that it is connected with ſomething that *Hardy* and *Martin* have done together, and that it can be brought home to *Hardy*, that he knew the facts contained in that letter, and that it was ſomething done in furtherance and accompliſhment of a conſpiracy between them.

Gibbs, adverted to the caſes of *Damaree* and lord *George Gordon*, what they declared while they were in action, was admiſſible evidence to ſhew what the object of theſe inſurrections was, and therefore it was received: but the court have never determined, that the declaration of a perſon unconnected with the priſoner, could, in any caſe, be received in evidence.

When a man is indicted for that which is done by a great aſſembly, and he is preſent at ſome times, and abſent at others, the declarations of other men acting with him in that very act for which he is indicted, are admiſſible evidence to ſhew what the object of that aſſembly was: but why was the letter laſt offered rejected?

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for this reaſon, becauſe it contained a relation of facts which relation of facts the priſoner was not cognizant of; what is the preſent letter? it is no more than the laſt letter; it contains a relation of facts; and then they would add to it, that the object of this relation of facts, was to keep up the ſpirit of a perſon in *Edinburgh*.

That a letter ſhould be evidence againſt the priſoner which he never ſaw; and for a purpoſe to which he never acceded, ſeems againſt all law, and is againſt all juſtice; for the object of this indictment is to try the *mind* of Mr. *Hardy*, that is, whether he did in his mind compaſs the death of the king.

Mr. *ſolicitor-general*, *(now lord Redſdale, chan. of Ireland.)* This is a declaration of conſpirators, in the progreſs of their conſpiracy. In the laſt caſe the letter was addreſſed to a perſon not ſhewn to be involved in the conſpiracy. This letter is addreſſed by *Martin*, proved to be chairman of a meeting to *Margarot*, deputy at the convention held at *Edinburgh*; it is therefore a converſation by letter, between two perſons parties to the conſpiracy, if a conſpiracy exiſted.

Now for the purpoſe of ſhewing the exiſtence of a conſpiracy, and for the purpoſe of ſhewing what the views of the conſpirators were, and how far they went, converſations of thoſe conſpirators totally diſtinct from the priſoner, have conſtantly been admitted in evidence. In ſupport of this poſition he cited lord *Stafford*'s caſe. 3 *St. Tr.* 101. *Serjeant Maynard's ſpeech. Ibid. Lord Lovat's caſe.* 9 *St. Tr.* 616.

Though this letter is evidence *quo animo*, *Martin* acted; it is not direct evidence *quo animo*, *Hardy* acted; but it is the nature of all plots that this ſort of evidence ſhould be given; ſeveral perſons are concerned; they are brought into one engagement; ſome of them may have views leſs culpable than others; but for the purpoſe of a jury determining the guilt of the particular perſon charged, the views, and the intentions, declared by converſation, eſpecially converſations between perſons concerned in the plot, which this letter is, is matter proper to be given in evidence, conſiſtent with the laſt determination; and upon the very foundation that it is what paſſes between perſons

engaged in a conſpiracy, while the conſpiracy is in its proceſs towards that concluſion which the conſpirators are charged to have in view.

Adair, ſerjeant, *Bearcroft*, *Bower*, and *Law*, ſpoke on the ſame ſide.

EYRE, C. J. It has been duly ſtated, what the nature of this queſtion is; namely, that if this were merely a trial for a conſpiracy, this would be evidence againſt one of the parties in that conſpiracy; becauſe the queſtion, whether this priſoner is to be reached upon the ſpecific charge againſt him, is undoubtedly a queſtion whether he is to be reached by that medium, and if the medium is once eſtabliſhed that queſtion ariſes.

In the caſe of a *conſpiracy*, general evidence of the thing conſpired is received, and then the party before the court is to be affected for his ſhare in it; the queſtion then is, whether a paper under the hand of a perſon who is proved to be one of the conſpirators ſhall be received in evidence, where it is nothing more than a paper under his hand? for as this caſe ſtands it is not a letter ſent to *Margarot*. There is no proof that *Margarot* ever received ſuch letter; and therefore it may be a paper merely written privately by *Martin*, who is the perſon in whoſe hands it is ſtated to be, and may never have gone out of his hands. The queſtion is, whether under theſe circumſtances, ſuch a paper is to be admitted in evidence in a caſe in which another perſon now ſtands at the bar; and this does not appear to be ſufficiently diſtinguiſhed from the caſe juſt determined, to ſatisfy my mind that it ought to be received in evidence.

It is undoubtedly true, that the general plot is to be made out, by proving the tranſactions of others, to which the priſoner may not be immediately a party; but then is it to be proved by the *mere acknowledgment* of theſe other parties, and ſo made uſe of againſt the priſoner? For inſtance, here is a conſpiracy charged. Suppoſe a witneſs ſhould come and ſay, "I heard *Thelwell*, and "*Martin*, and *Margarot*, ſay, that they were engaged "in ſuch a conſpiracy," that would be good evidence perſonally againſt the parties who ſaid it, to prove againſt them individually that they were concerned in that conſpiracy,

ſpiracy, but it would be no evidence whatever againſt third perſons. This was the caſe on lord *Stafford*'s trial; a witneſs proved that he heard A. B. and C. converſe upon the ſubject of a conſpiracy; that is a direct proof that theſe three perſons conſpired, and there the converſation of one is evidence againſt the other, and ſo on; that is, evidence of a tranſaction, a fact, not hearſay evidence, not evidence of a party's acknowledgment, only in as much as it is an acknowledgment by *one*, in the *preſence* of *others*, they acquieſcing, and therefore becomes diſtinct and proper evidence. But with regard to theſe perſonal acknowledgments of having meant to excite, for that is the nature of this letter, that is evidence if the party who was to be affected by it, ſtood at the bar to anſwer for it, but if another perſon was indicted by himſelf, no evidence could be received againſt that perſon but the evidence of facts, proved by the witneſſes, who prove the exiſtence of the facts in regular evidence, confeſſional evidence is *ad hominem* only. If it happens that a matter of fact is evidence againſt A. by evidence of the truth of that fact, other than the confeſſion of A. that does alſo become evidence againſt B. from the circumſtance of B. being connected in the plot, and B. being bound by all that A. has done. But the courſe that has been obſerved in the ſtate trials has been, that *confeſſions* have been made evidence againſt the individuals only who confeſſed. This is of the nature of confeſſion, and nothing more; and confeſſion has been conſidered as evidence only againſt the party making it, and is not to be received where that party is not the perſon before the court. Vide *cap. Confeſſ. Ante* 37.

Mac Donald, C. B. On the laſt queſtion I confined what I ſaid to the exact circumſtances of the caſe, namely, that the *bare relation* of acts by one of ſeveral perſons, to whom the conſpiracy is imputed, made to a perfect ſtranger to that conſpiracy, is no more than an admiſſion, which may poſſibly affect himſelf, but cannot poſſibly affect any of his co-conſpirators, it not being an act done in the proſecution of that conſpiracy. But this is a paper addreſſed by one of ſeveral conſpirators, to another of thoſe conſpirators, it is introduced as ſubſervient to the proof of the general nature and tendency

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of that conſpiracy, which is alledged and endeavoured to be proved as the foundation of affecting the priſoner with a ſhare in that conſpiracy. Now one conſpirator addreſſing a paper to another conſpirator, having relation to that conſpiracy, not merely a deſcription to a ſtranger, is an act complete in that ſingle conſpirator, although that paper ſhould be intercepted, or although it ſhould never reach that perſon for whoſe peruſal it was intended. That diſtinguiſhes this from the other caſe, it is a different act in one, though it does not reach the other, in that ſenſe; it is an act of one of the conſpirators, which, in order to ſhew the nature and tendency of that conſpiracy, may be read againſt any other.

HOTHAM, B. concurred with the chief baron.

BULLER, J. In lord *William Ruſſel's* caſe, lord *Howard* in his examination at large into evidence of what paſſed between him and lord *Shaftſbury*; and in parts of that evidence he goes on to ſay, that he ſuppoſed theſe things were told to lord *Ruſſel*: lord *Ruſſel* properly objects to that, he ſays it is hearſay, and does not affect him, but it is part of the evidence that is given, and is much relied upon by the chief juſtice, in ſumming up to the jury, with a view to the queſtion of *conſpiracy*, which is always to be diſtinct from the queſtion, whether the evidence does or does not affect the priſoner. The evidence given then by lord *Howard* is, that in a converſation with lord *Shaftſbury*, he aſked him what forces he had, to which lord *Shaftſbury* anſwered, that he had enough, and ten thouſand briſk boys were ready to follow him, whenever he held up his finger.

The chief juſtice ſtates this to the jury, repeating theſe words, as evidence of a *conſult*; but that it does not affect lord *Ruſſel*.

Then how ſtands this caſe? the firſt queſtion to be made out is, that there was ſome conſpiracy to affect the life of the king; and to make out that, you muſt go into evidence of what was done by other perſons. That, when eſtabliſhed, would not affect the priſoner, but is neceſſary to ſhew, that there was ſuch a conſpiracy on foot; and then go on to the ſecond queſtion, to ſee whether there is or is not evidence to prove that this priſoner

priſoner was acting a part in this conſpiracy. The queſtion will ſtand clearer if we ſuppoſe a conſpiracy, of the nature contended for on the part of the proſecution, had gone on without the intervention of ſuch a convention as had been proved by perſons committing their reſolutions to writing; if ſuch a combination exiſted, how in the nature of things could it be made out but by the declarations and converſations of thoſe who were parties to it. Suppoſe an equivocal expreſſion were uſed, ſhould not I prove by converſation of perſons preſent how they underſtood it? It is evidence that they meant that their plan ſhould go to ſuch an extent; then it becomes a ſecondary queſtion, whether the priſoner ſo underſtood it or not; it is an expreſſion equivocal; and if it is proved on the part of the proſecution that ſome meant to go to that extent, it is open to the priſoner to ſay it was not ſo meant by me, nor did I ſo underſtand it. But the queſtion now is not upon the effect of the evidence, but whether it ought or ought not to be received; and inaſmuch as it goes to the exiſtence of a conſpiracy, it ſeems to me that it muſt be received. What effect it will have muſt be conſidered hereafter.

Groſe, J. was of the ſame opinion on the ſame ground; and added, when it is ſaid, that this is merely a confeſſion, or a writing. I think it is more becauſe we know that in many circumſtances of this ſort it has been determined that *ſcribere eſt agere*, and the writing here is ſuch an act as may ſhew the extent of the plan, and the intention of the parties to that plan. I am of opinion it ought to be read. And the paper was read. *Hardy's tri. by Gurney, vol.* 1. *from* 368 *to* 398.

In the ſame caſe,

Garrow propoſed to read a letter from a ſociety at *Sheffield*, addreſſed to the priſoner. No part of it was in his hand-writing, and it was found in the poſſeſſion of *Thelwell*, who had it appeared, was in ſome inſtances an agent of that London Correſponding Society, of which *Hardy* was ſecretary.

Erſkine. The principle upon which the laſt piece of evidence was admitted was—that it might be evidence to ſhew a *conſpiracy*; yet would not go to affect the priſoner,

ſoner, unleſs brought home to him. In the evidence now offered, how does it appear to be the ſame Sheffield ſociety with which this ſociety was in correſpondence? It is written in the ſame hand-writing. Does it profeſs to be written by the ſame perſon who before correſponded with the priſoner?

Garrow. We do not ſtate this is the Sheffield Society with which they correſponded; but to be from a ſociety at Sheffield, with which town they were in correſpondence, ſigned by a perſon purporting to be a ſecretary.

EYRE, C. B. This letter is in a different ſituation from the other. It is a letter purporting to come from one of theſe ſocieties; it is addreſſed to the priſoner, and it is found in the hands of a perſon affected by the evidence, at leaſt to involve him in this conſpiracy. The letter was read. *Hardy's tr. by Gurney, vol.* 1. 412, 413.

In the KING *v.* JOHN HORNE TOOKE, tried on the ſame indictment, *Old-Bailey, Nov.* 1794. The counſel for the crown tendered as evidence the draught of an anſwer meditated to have been ſent by *Hardy* to a letter from *Stockport* directed to him as ſecretary to the Correſponding Society, and found in his poſſeſſion.

Erſkine, for the priſoner, objected to receiving ſuch draft in evidence on this ground, that a paper which had been found inſufficient to convict *Hardy* (who had been tried and acquitted on the ſame indictment that charged the priſoner) ought not to be read againſt another perſon.

EYRE, C. J. The charges brought againſt the priſoner related to tranſactions in which ſeveral perſons, and among others, *Hardy* were involved; and though a jury has determined that the ſhare taken in thoſe tranſactions by *Hardy* was not criminal, his acquittal did not however prevent whatever was connected with the conſpiracy from being evidence againſt the priſoner.—Objection over-ruled. *Dublin edit. Tooke's trial*, 320.

In the ſame caſe it was admitted, that where a charge is againſt ſeveral for conſpiring to do a certain act, and one of the perſons with whom the priſoner on trial is implicated, has been *acquitted*, the *record* of that acquittal may be given in evidence on the part of the priſoner; and

and clearly the party acquitted is a competent witneſs. *Ibid.*

In the KING *v.* JAMES WELDON. *Commiſ. Oyer and Terminer, Dublin, December*, 1795, tried and convicted of treaſon in compaſſing the death of the king.

On an objection by *Curran* and *Mac Nally* for the priſoner, anſwered by *Fitzgerald*, prime ſerjeant.

CHAMBERLAIN, J. and GEORGE, B. held that it being once eſtabliſhed that a treaſonable ſociety exiſted, of which the priſoner was a member, acts done in that ſociety were admiſſible evidence againſt the priſoner, though he was abſent from the ſociety at the time thoſe acts were done. *Ridgeway's Rep. Weldon's tr.* 42, 43

In the KING *v.* JOHN LEARY, on the ſame indictment, at the ſame commiſſion.

Mac Nally, for the priſoner, objected, that though all acts done at general meetings of perſons implicated in a conſpiracy was legal evidence againſt a priſoner charged as being one of the conſpirators; yet the private declaration of an individual not appearing to have been communicated to the body at large, or at all adopted by it, could not be received as evidence againſt the priſoner. The COURT acceded. *Ridgeway's Rep. Leary's tr.* 105.

In the ſame caſe, papers which had been received in evidence in *Weldon's* caſe, being offered in evidence againſt the priſoner *Leary*,

Mac Nally, his counſel objected, that though theſe papers were admitted as evidence in *Weldon's* caſe, they were now liable to ſtronger objections than thoſe made on the former trial. It did not appear that theſe papers were ever in the poſſeſſion of the priſoner, or that they were the *ſame* papers that he was ſworn to in the ſociety; or that they were ever ſhewn to him, or ever read in his hearing; or that he was ever made acquainted with their contents.—Neither did it appear that any perſon, having poſſeſſion of theſe papers, was in any one inſtance in company with the priſoner. The evidence was, that the witneſs had ſeen the priſoner at a houſe in *Stoneybatter*; there was a paper laid upon a book, and ſomething ſaid, which he does not know, nor does he venture to ſwear that either of the papers laid

epon the book was the identical paper offered now as uvidence. Therefore he ſubmitted that this caſe was diſtinguiſhable from the point determined in *Weldon*'s caſe, and on the trial for treaſonable conſpiracy in England; for it did not appear that theſe papers were read or uſed at the meeting in *Stoneybatter*, or at any other ſeditious meeting, having in view the perpetration of the offence charged upon the priſoner as a conſpirator in treaſon; if that were the caſe, the objection would be weakened indeed; but there was no evidence of that, or of any other fact to ſhew that the priſoner knew their contents: and no paper ought to be read againſt a priſoner without previous proof that he knew their contents, and aſſented thereto or admitted them—to admit the reading of ſuch papers would be to receive the weakeſt preſumption as evidence againſt the priſoner.

Mr. *Prime Serjeant (Fitzgerald)* inſiſted, that the papers offered ought to be read on two grounds. The principle upon which the court had already determined one or two points of evidence went directly to determine the admiſſibility of the papers independent of the ground on which they were originally offered. The principle upon which the general acts of a body are admiſſible againſt an individual of that body applied to theſe papers. What had the witneſs ſaid to introduce theſe papers? He ſaid that he was ſworn upon theſe papers, that ſigns of the *defenders* were then communicated to him, and that upon a ſubſequent meeting between him and the priſoner, there was a communication between them of more ſigns. The ground upon which theſe papers were offered was as explanatory of what *Hart*, one of the conſpirators, had ſaid, which was acquieſced in by the priſoner, and acted upon that very night. The ſecond ground for receiving them was—that the papers were brought forward in ſupport of the conſiſtency of the witneſs *Lawler*, to ſhew that he had pointed out theſe papers as being in the poſſeſſion of *Kennedy*, a conſpirator, and the ſame principle which induced the court to admit evidence of the place where the papers were found, calls for the admiſſion of the papers themſelves.

CHAMBERLAINE,

CHAMBERLAINE, J. B. R. was of opinion that the evidence ſhould go to the jury in the point of view mentioned by the counſel for the crown, namely, as evidence of the intentions, ſchemes, and deſigns of the perſons aſſociated under the name of defenders; and if the court ſtopt the evidence, it would interrupt the train of ſuch diſcovery. It cannot be denied that there is evidence to go to the jury of the proceedings of defenders. At the firſt meeting an oath was adminiſtered to the witneſs, and certain private ſignals communicated to him by which he was to be introduced. The priſoner was acquainted with thoſe ſignals, and communicated them to the witneſs; therefore the papers muſt be material to develope the real deſigns of thoſe perſons. It is of the eſſence of this charge, (a treaſonable conſpiracy) that the jury ſhould be convinced of what the ſchemes of the defenders were, and there is nothing more proper to ſhew than theſe papers, becauſe the jury may infer that every man aſſociated muſt have been privy to their deſigns, provided they believe that the papers are the ſame. *Ridgeway's Rep. Leary's tri.* 126.

In the KING *v.* WILLIAM STONE, indicted at bar, *Hilary*, 1796, for high treaſon, in compaſſing the death of the king, ſeveral points of evidence in conſpiracy were ruled.

Lord GRENVILLE, who was examined as a witneſs, ſaid, that certain letters then produced came to him in a confidential way which ought not to be diſcovered; and he had reaſon to believe they came from abroad.

Theſe letters being proved to be the hand-writing of the rev. *William Jackſon*, who had been tried and convicted of high treaſon in Ireland, and who was charged in the indictment to have conſpired with *Stone* in the treaſons charged, were offered in evidence.

Adair, Serj. counſel for the priſoner, objected to the reading of thoſe letters. He ſaid there was no principle or rule of evidence upon which they could be offered in ſupport of the preſent indictment againſt the priſoner. There was no evidence that they ever came directly or indirectly to the hands or the knowledge of the priſoner; but there was evidence of the direct contrary to be pre-

ſumed by the manner in which they were produced. They were letters ſaid to be written by *Jackſon*, probably written by him, and tranſmitted by him abroad, not through the priſoner, and of the contents of which, as ſuch, it was impoſſible that the priſoner could ever have had any knowledge. Therefore the queſtion being upon a charge that the priſoner had acted with a knowledge of the views of *Jackſon*, and that he co-operated in thoſe facts, it was impoſſible that any thing written, any thing ſaid, any thing done, by *Jackſon*, not proved to have come to the knowledge of the priſoner, could be in any degree evidence to implicate him in the guilt of *Jackſon*; it was not competent looſely to enter into any queſtion of the contents of theſe letters; whether they do ſhew any guilt of *Jackſon*, whether they diſcloſe what *Jackſon*'s views in ſending thoſe letters were, becauſe it was admitted.

The *Attorney General*, for the crown. The objection is, that becauſe the papers were not proved to have been ſeen by the priſoner, that therefore in an indictment, where the overt-act is a *conſpiracy*, they are not evidence to go to the jury. Now the indictment charges that the priſoner conſpired with *Jackſon* and others to ſend *intelligence*, among other things, with reſpect to the ſtate of affairs in this country; and therefore theſe papers are offered as evidence of an act done by *Jackſon* in furtherance of the conſpiracy. The letters were read in evidence by order of the court. *Stone's tri. by Gurney, edit.* 147. *Ante Leary's caſe*, 626.

In the ſame caſe, the *Attorney General* on proceeding to offer in evidence a letter proved to be in the hand-writing of the rev. *William Jackſon*, dated *March* 17, 1794, ſaid, that the ground he offered this letter as evidence was, that it was in the hand-writing of *Jackſon*, and that it pointed out the places in which an invaſion might be made in the country, and that it was ſent abroad by *Jackſon*. The queſtion was, whether this letter could be read in evidence againſt the priſoner? And he conceived it might, on theſe grounds, that is to ſay: the overt-acts charged by the indictment were—a *conſpiracy* between *Hurford Stone*, *William Stone*, and *Jackſon*, to give intelligence to the enemy where they might invade

vade the country, and aſſiſting each other in procuring that intelligence. It was not neceſſary to ſtate all that had been already proved with reſpect to the connection between *Jackſon* and the priſoner; but he was intitled to ſtate, generally, that it had been proved to be a common object both to communicate (*quo animo* was to be conſidered afterwards) intelligence to the enemy upon this ſubject. It was eſtabliſhed that the intelligence which was procured by *William Stone* was in point of fact communicated to *Jackſon* firſt, and by *Jackſon* afterwards—then the rule of evidence follows, that having once brought together perſons conſpiring for one common object, whatever they do with reference to the ſame end, is evidence to be admitted againſt both, ſubject always to the deciſion of the jury, how far that evidence which is admitted againſt both ſhould be taken to bear, in its inference and effect againſt the particular perſon.

In ſupport of his argument, the attorney-general cited the caſe of the *King*, at the proſecution of the counteſs of *Strathmore v. Stoney Bowes*, and others. It was an information in the King's Bench for conſpiring to run away with the proſecutrix. The cauſe was tried before Mr. Juſtice *Buller*. The priſoner's counſel contended, that acts done by individuals upon that record, in the abſence of each other, could not be given in evidence againſt perſons who were not preſent at the committing of ſuch acts; but the COURT ruled, that when proof is given that the parties charged had a connection with the conſpiracy, every act that any one did in that conſpiracy was evidence againſt each.

The ſame rule was alſo laid down repeatedly in the late ſtate trials. It was the baſis of the whole proceedings on thoſe trials, and there was hardly one tittle of evidence could have been given on thoſe trials unleſs this was the rule. Now if it has been proved that *Jackſon* came from *France* to *England* addreſſed to *Stone*, and that *Jackſon* and *Stone* were in habits of communication together upon the ſubjects charged in the indictment, and that they continued their correſpondence upon theſe ſubjects after *Jackſon* had left this country and went into *Ireland*, this letter, containing the ſubſtance of thoſe communications which had

had before been made by *Stone*, and being communicatory for the ſame purpoſe, upon the common principle before laid down, it is the act of a perſon firſt proved to be embarked in the ſame ſcheme and project, done for the purpoſe of carrying on that common ſcheme and project, and as ſuch is admiſſible evidence in conſpiracy.

Adair, ſerjeant, for the priſoner, anſwered, that the principle upon which the queſtion was to be decided, was eſſentially diſtinguiſhable from both the caſes put by the attorney-general, and from every caſe he had ever heard of, to which evidence that can in any degree be aſſimilated to the preſent caſe can be received. He admitted, that when ſeveral conſpirators charged with confederating together for the commiſſion of the ſame offence, are put upon their trials *together*, that then there cannot be a doubt that every piece of evidence that affects any one of them, is admiſſible upon that trial, though it might not be evidence againſt others: and it then becomes the duty of the court, to diſtinguiſh the *effects* of thoſe pieces of evidence, which are legal evidence againſt one of the parties accuſed, and which are not legal evidence againſt the other. But the caſe is totally different, where evidence is to be given of acts done by a conſpirator, *not* upon his trial; and acts done by that conſpirator, when he was ſeparated and at a diſtance from the perſon with whom he is accuſed of having confederated with the object charged in the indictment.

The evidence received on the late ſtate trials, is eſſentially diſtinguiſhable from that now offered in this. The charge againſt all the priſoners upon thoſe trials was for acts done by them, as members of a ſociety, alledged to be confederated together for the purpoſe, by their collective ſtrength, and by their collective acts of overturning the government and conſtitution of their country. It was upon *that* ground alone that the attorney-general then contended, that the acts of theſe ſocieties were evidence againſt each and every one of the priſoners, who were members of theſe ſocieties, after general evidence had been given implicating them in one general deſign; becauſe, from the very nature of theſe acts, they were *collective* acts, done by the ſocieties of which thoſe perſons were members, or of ſocieties proved

to

to be in direct correſpondence for the purpoſe, with the ſociety of which they were members. And in no one inſtance in theſe trials, was the individual act of any member of thoſe ſocieties not done in the communication immediately to the ſocieties themſelves, but expreſſive of the private ſentiment and opinion of that individual member, given in evidence againſt any but the individual perſon; no declarations *out* of theſe ſocieties, and not in immediate communication and correſpondence with thoſe ſocieties, no declarations of individual members were given in evidence againſt any others, except the letters of the ſecretaries of the ſocieties, which were conſidered as evidence againſt the members of that ſociety, of which evidence was given that they were implicated in one general deſign. Where are we to ſtop, if evidence is to be given to affect Mr. *Stone* with the criminality of a letter of *Jackſon*, writing letters in another country to perſons, with whom Mr. *Stone* is not proved to have any connection, and no tittle of which is even pretended to be communicated to him. The preceding letter was read, on the ground of its reciting papers which had been brought home to the priſoner, but in this letter there is nothing which has been brought home as evidence againſt him; there is no reference to any act of his; no proof, in the ſlighteſt degree, of his privity to any one ſentiment that this letter is ſuppoſed to expreſs; and ſo far from its being evidence of a confederacy together, in furtherance of the ſame object, it is evidence to the direct contrary; becauſe every part of the information communicated by *Stone* to *Jackſon*, was evidence tending to prevent an invaſion of this country, whereas this letter of *Jackſon*'s as ſtated by the attorney-general, invites and points out the places for an invaſion.

Erſkine, ſame ſide. In the late trials the court in admitting the evidence adverted to, pronounced its judgment in this manner: that is to ſay, that the counſel for the priſoners ſeemed to conceive that it was offered as evidence to affect the priſoner; whereas lord chief juſtice *Eyre* deſired that it might be for ever recollected, that the cauſe divided itſelf into two branches, that the counſel

counſel for the crown were firſt to ſhew that a conſpiracy exiſted, as an abſtract propoſition; and then that the priſoner was a member of that ſpecific conſpiracy. That though evidence may be given of any thing done, or ſaid, by perſons not preſent and co-operating in what they did or ſaid with the priſoners, that then the evidence was belonging to the firſt branch of the diviſion, as competent to prove the firſt, but not the ſecond branch of the charge upon the record; that is, to prove that a conſpiracy did exiſt, but not to ſhew that A. B. or C. had any ſpecific ſhare in that conſpiracy. If this evidence is only to be received in that faſhion, and ſubject to that limitation, there can be no objection to the deciſion on the late trials; for what is ſtruggled againſt here is, that what *Jackſon* in this letter propoſes to communicate cannot be evidence againſt this gentleman in any other way than to ſhew whether *Jackſon* was guilty; and it is not material to the priſoner whether he was or no.

Mr. *attorney general*, (in reply.) No evidence can be received in a trial between the crown and a priſoner, which is not evidence to be put to a jury, whether it does affect that priſoner or not. In the caſes referred to, the evidence was received upon the principle ſtated; upon the principle which has been acted upon in every caſe of treaſon, of murder, of conſpiracy, that is to be found where the act of any particular perſon has been given in evidence againſt any man abſent. The evidence referred to, was offered on a full perſuaſion, that the law of England can never admit evidence to be received, which it will not permit to go to the jury, finally to determine whether it does or does not affect the priſoner: but when perſons are brought together for one and the ſame common end, whatever one does with reſpect to one and the ſame common end, is a fact to be received againſt all of them; and unleſs upon the diſcuſſion of the effect of the acts which individuals do, and the acts which other individuals do, engaged in the conſpiracy, you cannot ſay the individual on trial is guilty, you muſt acquit him; but ſtill if he acts in furtherance of the ſame conſpiracy, it muſt go to the jury, to determine whether

whether the accuſed does authorize and concur in thoſe acts done in furtherance of the conſpiracy.

In the late trials the letter of *Martin*, addreſſed to no perſon, and the letter of *Thelwell*, in which he ſpoke of the Americans having too much veneration for property; too much for religion, and too much for law, and which was addreſſed to a particular perſon, but which had reference to the ſociety for conſpiring were read. It is ſaid, if perſons are *trying together* for a conſpiracy, ſuch evidence may be read; how can *Jackſon* be tried upon this record, who was tried and died a year ago? in lord *Stafford's* trial this ſort of evidence was admitted. In the caſe of murder, where a man holds horſes at a gate, and the murder is committed in the field, the acts in the field are to be given in evidence againſt the man who ſtands at the gate: why? becauſe it is for the jury to conſider, whether the ſtanding at the gate, and holding the horſes, is an act done in execution of one common purpoſe with thoſe who in his abſence are murdering the perſon in the field. In the caſe of burglary and of riot, it is the ſame. Vide *lord Stafford's caſe. Ante* 619. *Lord Lovat's caſe. Ante* 619.

Lord KENYON, C. J. That there is ſufficient evidence to connect *Jackſon*, and *Stone*, the priſoner at the bar, ſufficient evidence given to permit that concluſion to be made, there can be no doubt. If acts done by the ſocieties at *Sheffield*, were ſufficient to aſcribe guilt to parties not preſent at the time. If letters written by the ſecretaries to thoſe ſocieties, not communicated to the perſon to whom the guilt was to be imputed by theſe letters, otherwiſe than ariſing from their acting in concert with their parties, if that was ſo decided, this point is decided.

Rule the Third.

It is alſo ſettled, that the fact of conſpiring need not be proved, but may be collected from other circumſtances.

As in the KING *v.* PARSONS, and others. The defendants were convicted on an information for a conſpi-

racy, to take away the character of one *Kemp*, and accuſe him of murder, by pretended converſations and communications with a ghoſt, that converſed by knocking and ſcratching in a place called *Cock-lane*.

Lord MANSFIELD, who tried the information, directed the jury, that there was no occaſion to prove the actual *fact of conſpiring*, but that it might be collected from collateral circumſtances; and ſhould be glad to know the opinion of his brethren, whether he was right in ſuch direction. *Quod nemo negavit.* 1 *Blackſ. Rep.* 392, 401.

Rule the Fourth.

So if ſeveral perſons meet at a particular place, from different motives, and being met, all act together to one common end, ſuch acting together makes all the parties conſpirators.

As in the KING (at the proſecution of *Charles Macklin*) v. LEE, and others, *B. R. England*, 1774.

Macklin was an eminent player, and ſeveral attempts were made to drive him from the ſtage. The court of king's bench granted an information againſt the defendants for *conſpiring* to ruin him in his profeſſion, &c. *Vide* the Inform. *Dough. Cr. Cir. Aſſiſt.* 160.

On the trial, the defendants counſel inſiſted, that the proſecutor, in ſupport of a conſpiracy, ſhould give evidence to ſhew, that there was a *previous* meeting of the parties accuſed, for the *purpoſe* of *confederating* to carry their purpoſe into execution.

Lord MANSFIELD over-ruled the objection. Conſpiracy, he ſaid, was derived from the verb *conſpiro*, a breathing together; and therefore if a number of perſons met together for *different* purpoſes, and afterwards joined to execute one common purpoſe, to the injury of the perſon, property, profeſſion, or character of a third perſon, that was conſpiracy, and it was not neceſſary to prove any previous conſult or plan among the defendants againſt the party intended to be injured. *MS.*

CHAPTER

CHAPTER XXVIII.

Of Evidence on an Indictment for Perjury.

Rule the First.

A JURY ought not to convict a defendant charged with this offence, without clear proof that the falſe oath alledged againſt him was taken with ſome degree of deliberation: and therefore they ought not to convict, if, upon the whole circumſtances of the caſe, it ſhall appear probable, that it was owing rather to the weakneſs than perverſeneſs of the party; as where it was occaſioned by ſurprize or inadvertency, or a miſtake of the true ſtate of the queſtion. 1 *Hawk. P. C. ca.* 69. 5 *Mod.* 350. *The King v. Melling.* 10 *Mod.* 195. *The Queen v. Muſcot.*

Rule the Second.

Two witneſſes are required in proof of perjury: otherwiſe there would be only one oath againſt another. *Ante* 37. 4 *Blackſ. Comm.* 150.

For written evidence admiſſible on a trial for perjury, *vide Ante* 468, *to* 474. *Law of Evidence* 289. 3 *Mod.* 116, 117. *Lord Raym.* 451, 893, 936, 1281. *Caſes Temp. Will.* 3. 511. *Caſes Temp. Maccles.* 74, 108, 199, 194, 195. 3 *Peere Will.* 196. 1 *Strange* 545.

In the KING *v.* JAMES. Information for perjury, in an affidavit in the common bench, made before the commiſſioners in the country, in a certain cauſe depending there, was tried before EYRE, and the defendant convicted. Several exceptions ariſing upon the evidence, the judge ſtopped the *poſtea* until the opinion of the court was had. The *proof* of the cauſe depending was only a capias, the warrant thereon, and an affidavit filed. Another exception was urged, that there was no proof that the party before whom the defendant was ſworn,

was a commiſſioner; and the court held there need not, unleſs diſproved on the other ſide.

It was then ſuggeſted, that the evidence was *only* by *copy* of an affidavit, and no evidence that it was the defendant's; that this was a dangerous practice; any man might be thus repreſented and ſubjected, by the fraudulent ſubſtitution of his name, to the penalty and infamy of perjury.

The COURT admitted the force of the objection, if an affidavit were to be thus proved ſingly. But where it was regularly introduced by evidence of a cauſe commenced, which is very different from imputing an affidavit to another, without eſtabliſhing a ground why there ſhould exiſt one, or ſhewing a reaſon for its being made, or that it was uſed by the party in the cauſe. *Judgment pro rege. Show.* 397. *Law of Evid.* 291. *S. C.*

CHAPTER XXIX.

Of the neceſſary evidence to ſupport an Indictment of SUBORNATION of PERJURY; which is the proving a perſon to take a falſe Oath, amounting to Perjury.

Rule

TO bring the offender within the legal meaning of this offence, it is neceſſary to alledge in the indictment, and to give in evidence, upon the trial, that the party ſo ſuborned, did actually take ſuch falſe oath. *The King v. Henton, and Brown.* 3 *Mod.* 123. *Keb.* 399.

NOTE. A perſon attainted of ſubornation of perjury, falls within the rule of *infamy*, incapacitating from giving evidence. *Repelliter a ſacramento dicendo qui jure ſit infamis.* Vide *Ante* 206, *to* 213.

CHAPTER

CHAPTER XXX.

Of Evidence to ſupport an Indictment for Forgery.

FORGERY, by common law, is the *falſely* and fraudulently *making* or altering any matter of record, or any other authentic matter of a public nature, as a pariſh regiſter, or any deed or will; in order to give ſuch inſtrument or writing an appearance of truth, and thereby impoſe that upon the public, as the ſolemn act of another, which he is no way privy to; or to make a man's own act appear to have been done at a time when it was not done, and by force of ſuch falſity, to give it an operation, which in truth and juſtice it ought not to have. 1 *Hawk. P. C. ca.* 70. 11 *Co.* 27. *Foſt.* 117.

Rule.

From the above definition reſults a perſpicuous and general rule, that in all charges of forgery, whether the indictment be at common law or by ſtatute, there muſt appear in evidence circumſtances to ſatisfy the jury, beyond a reaſonable doubt, that the defendant had a deſign to cheat or defraud ſome perſon or perſons named in the indictment: and the ſame rule is alſo applicable to the offence of publiſhing, uttering, &c. as the caſe may be. Vide COMPETENCY and VARIANCE, *in Index.*

CHAPTER XXXI.

Of Evidence to ſupport an Indictment againſt Cheats at Common Law, and on the Statutes, 33 *Hen.* 8. *ca.* 1. 30 *Geo.* 2. *ca.* 24. *Iriſh.* 26 *Geo.* 3. *ca.* 37. 13 *Stat. at large,* 842.

CHEATS puniſhable at common law are, in general, thoſe who by deceitful practices *defraud*, or *endeavour* to defraud another of his right, by means of ſome *artful device*, contrary to the plain rules of common honeſty; but there muſt be an *artful contrivance*, and not a bare *naked lie*. 1 *Hawk. P. C. ca.* 71.

Rule the Firſt.

As an indictment for a fraud, by obtaining money under *falſe pretences*, againſt the *ſtat. of Geo.* 2. muſt ſtate what the falſe pretences were by which the fraud was effected; ſo the falſe pretences ſtated, muſt be proved in evidence. *The King v. Maſon. Leach's Cr. Ca.* 3 *edit.* 548. 2 *Term. Rep.* 586. *Poſt* 640.

Rule the Second.

In order to conſtitute the offence, the property muſt be obtained either by *conſpiracy*, or by means of a *falſe token* as well as a *falſe pretence*, and not by a mere falſe *aſſertion*, a falſe *meſſage*, or mere *naked lie*. 1 *Hawk. P. C. ca.* 71.

So ruled in the KING *v.* BENJAMIN LARA, *Old-Bailey, Decemb. ſeſſ.* 1794. The evidence was, that the priſoner, on the day laid, purchaſed from the proſecutor, *Benjamin Mendez da Coſta*, a large quantity of lottery tickets, bargained with him to the amount of 2157*l.* 10*s.* and obtained the delivery of them from him, by giving him a draft for the amount on Meſſrs. *Ladbroke*, and Co. bankers, in whoſe hands he was ſo far from having caſh, that he had not even opened an account with them.

Shepherd, in *Trinity* 1796, obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted, becauſe *firſt*, the indictment being for a fraud at *common law*, it ought

ought to have charged, that the defendant had uſed ſome extrinſic token againſt which common prudence would not have been ſufficient to guard, and not his *bare aſſertion* only, for the purpoſe of effectuating the fraud. *Secondly*, this tranſaction was merely of a *private nature*, upon a ſubject that only concerned the parties themſelves, and not a matter of *public concern*, as it muſt be for the purpoſe of ſupporting an indictment.

Erſkine, *Garrow*, *Wood*, and *Knowlys*, on ſhewing cauſe, argued, that the indictment had been framed for a fraud at common law; becauſe the *ſtatutes* 33 *Hen.* 8. *and* 30 *Geo.* 2. only applied to ſuch perſons as ſhould by *falſe tokens*, or falſe pretences, obtain *money* or *goods*, and that by analogy to other caſes, it was apprehended *lottery tickets* might not be within either of theſe deſcriptions. They admitted, that according to the *King* v. *Wheatley*, 2 *Burr.* 1125, that a fraud upon an individual muſt, to be indictable, be effected either by *conſpiracy* or by a *falſe token*, as well as a *falſe pretence*, of ſuch a nature as common prudence could not guard againſt; and they contended, that the *falſe pretence* in the preſent caſe was, that he wanted to purchaſe lottery tickets, and the *falſe token* the draft upon the bankers, which he gave for the purpoſe, and as the means of getting poſſeſſion of them. This draft imported on the face of it, that *Lara* had a right to draw on *Ladbroke* and company, and therefore it amounted to more than a bare promiſe to pay; for he could not have obtained poſſeſſion of the tickets on ſuch promiſe alone. *The King* v. *Locket*, *Leach*, *Cr. Ca.* 3 *edit.* 110. *Foſt.* 120. *Latch.* 201. 2 *Ld. Raym.* 1179. *Sayer* 206. 2 *Strange* 1127. 1 *Blackſ. Rep.* 273.

Lord KENYON, C. J. The true boundary between the frauds which are, and thoſe which are not indictable at common law, is clearly ſettled in the *King* v. *Wheatley*. It is there ſaid, that there muſt be either a *falſe token*, or a *conſpiracy*; for a *falſe affirmation* alone is not ſufficient; as in the caſe there mentioned, where a perſon falſely affirmed, on ſelling a ſack of corn, that it contained a *Wincheſter buſhel*. In the preſent caſe, the defendant uſed no falſe token, but obtained the credit ſolely on his own

own *falſe aſſertion.* He ſat down indeed, and drew a *draft* upon a banker, but the drawing of this draft left his credit exactly as it was before, and therefore it cannot be called a *falſe token.* His conduct was groſly immoral; but as he uſed no falſe token to accompliſh the deceit, the judgment muſt be arreſted.

GROSE, J. HAWKINS ſpeaking of cheats ſays, "It is "an indictable offence to defraud another of his known "right, by means of ſome *artful device;* but that the "deceitful receiving of money from one man to ano-"ther's uſe, upon a *falſe pretence* of having a meſſage or "order to that purpoſe, is not puniſhable by a criminal "proſecution, becauſe it is accompanied by no manner "of *artful contrivance,* but wholly depends on a bare "naked lie." To make the aſſertion of the defendant in the preſent caſe ſomething more than a bare naked lie, it ſaid that the draft on the banker was a *falſe token;* but that was only adding one falſehood to another, and if this were to be determined an indictable offence, I do not know how to draw the line, for it might be equally ſaid, that every perſon who over-drew his banker, uſed a *falſe token,* and might be indicted for it. 1 *Hawk. P. C. ca.* 71. *ſec.* 2. *Ante* .

LAWRENCE, J. concurred, and mentioned *Nebuff's* caſe, where a perſon borrowed ſix hundred pounds of a married woman, and promiſed to ſend her fine cloth and gold duſt as a pledge; and ſent no gold duſt but ſome coarſe cloth worth little. The court held it was not a matter criminal, but it was the woman's fault to repoſe ſuch a confidence in another perſon. 1 *Salk.* 151. *Leach Cr. Ca.* 3 *edit.* 739 *to* 753.

Rule the Third.

It hath been determined, that the ſtatutes of *Henry* 8. and *Geo.* 2. are made in *pari materia,* and that the latter only enlarges the deſcription of the offence given in the former, and that whatever has been determined in the conſtruction of one of them, is a ſound rule of conſtruction as to the other. *The King v. Maſon,* 2 *Term. Rep.* 586. *Leach. Cr. Ca.* 3 *edit.* 548. *Ante* .

And

And it has been determined in the *King v. Munoz*, that to bring an offender within the ſtatute of *Hen.* 8. there muſt be evidence of a *falſe token* uſed: and therefore where the evidence was, that one man went to the houſe of another, and pretended that another perſon had ſent him to receive twenty pounds and received it, whereas ſuch perſon did not ſend him, it was held no offence within the ſtatute. 2 *Stra.* 1127.

Rule the Fourth.

The ſtatute of *Geo.* 2. extends to every caſe where a party has obtained money by falſely repreſenting himſelf to be in a *ſituation* in which he was not; or any occurrence that had not happened, to which perſons of ordinary caution might give credit.

Therefore in the KING *v.* YOUNG, and others, *on writ of error in Banc. Reg.* The error aſſigned was, that the offence, as deſcribed in all the counts of the indictment, was not an offence againſt either the ſtat. of *Hen.* 8. or *Geo.* 3. The *evidence* was, that *Young*, and the other defendants, pretended to one *Thomas*, that he, *Young*, had made a bet of five hundred guineas, with a colonel in the army then at Bath, that one *Lewis* would, on the next day, *run* on the high road, ten miles in an hour; and under colour and pretence of having made the bet, they obtained from *Thomas* twenty guineas as a part of the bet, though no ſuch bet was made. The court held this offence, which was deſcribed in the indictment, as proved to be a *falſe pretence* within the ſtatute of *Geo.* 3. for this ſtatute hath introduced another offence, than that in the ſtat. of *Hen.* 8. deſcribing it in very general terms. *Leach's Cr. Ca.* 3 *edit.* 568.

NOTE. In the KING *v.* ANNESLEY SHEE, *Middleſex ſeſſ.* 1800. On evidence that a promiſſory note was obtained under a falſe pretence, and afterwards, and before the day in the indictment, was converted into caſh by the defendant, it was held to be the ſame as if *money* had been originally received, by the deception uſed. *MS.*

CHAPTER XXXII.

Of Evidence to ſupport an Indictment for a Libel.

Rule the Firſt.

TO conſummate the offence of libelling, evidence of *publication* is eſſential.

It was reſolved in *Trinity*, 9 *of Will. and Mary*, that *poſſeſſion* is evidence of the defendant's being author or publiſher: for though he never publiſhed, yet having the libel in readineſs for that purpoſe, is criminal, and though he might deſign to keep it private, yet after his death it might be injurious to government. *Carth.* 409, 410.

In the KING *v.* BEARE, *Hil.* 10 *Will.* 3. *B. R.* it was reſolved. *Firſt*, that copying a libel is not in itſelf a publication, but *evidence* of publication. *Secondly*, if a libel be publicly known to be publiſhed, poſſeſſion of a copy is *evidence* of publication: but *contra* where it is not known to be publiſhed. *Thirdly*, where a libel is produced, and the author is not known, that amounts to *prima facie* evidence, that the writer is the author, and throws the proof upon him; and if he cannot produce the compoſer, the verdict muſt be againſt him. *Fourthly*, taking the copy of a libel, is evidence of a libel, becauſe it comprehends all that is neceſſary to make a libel. And HOLT, C. J. ſaid, that the making is a genus, and compoſing, contriving, and writing, are ſpecies; and TURTON and ROKEBY, J's. cited caſes to ſhew that *writing* a libel, without *publiſhing*, was puniſhable in the ſtar-chamber, and by conſequence is now puniſhable by indictment. 1 *Vent.* 31. 1 *Ld. Raym* 417.

And HOLT, C. J. added, where a libel appears under a man's hand writing, and no other author is known, he is taken in the *manor*, and it turns the proof upon him. *Ibid.* 2 *Salk.* 419. 12 *Mod.* 220, 221. 4 *Read. Stat.* 155.

But

But in ENTIC *v.* CARRINGTON, and others, *Mich. 6 Geo.* 3. it was ſaid, papers are the owner's goods and chattles, and until *publication*, a writing is as the thoughts of the compoſer, not manifeſted by any outward act; and therefore previous to publication, the papers of a man are in every ſenſe his property, the ſecure enjoyment of which it is one of the primary ends of ſociety to protect. 11 *St. Tr.* 321.

In BARROW *v.* LLEWELLEN, the rule was thus laid down. A libel is clearly publiſhed, if but a ſingle copy reaches a ſingle hand to whom it conveyed with intent of publiſhing to that perſon, by making the contents known. But if ſtolen from the author, or ſeized by violence, whether under colour of law, or without ſuch pretence, this is not a publiſhing, ſo as to affect the author. *Hob.* 62.

In BALDWIN *v.* ELPHINSTON, *error in Excheq. Chamb. from B. R. Trinity*, 15 *Geo.* 3. it is held, that though printing is *prima facie* evidence of publiſhing, it is not concluſive evidence. 2 *Blackſ. Rep.* 1038.

But printing in a newſpaper admits of no doubt upon the face of it: and it ſhall be intended a publication, unleſs the defendant ſhews by evidence, that the newſpaper ſo printed by him, was ſuppreſſed and never publiſhed. *Ibid.*

In the ſame caſe, various modes of publication are ſtated, *viz.* a written libel may be publiſhed in a letter to a third perſon; or by fixing the libel on a public place. *Raſt. Entr. tit. Act. ſur le caſe.* 3. *a. Lord Raym.* 341. 417. 486. But reading a libel in the preſence of another, or repeating part of it in merriment, is not evidence of publication. 9 *Co.* 59. *Moor* 813. *Salk.* 418. *Hawk. P. C. ca.* 73. *ſec.* 11. But to read a libel, or to hear it read by another, and afterwards maliciouſly to read, or repeat any part of it, in the preſence of others; or lend or ſhew it to another, are facts, which when proved, eſtabliſhes a publication. 3 *Bac. Ab.* 497. 12 *Vent. Abr. pl.* 1. 229. 2 *Blackſ. Rep.* 1038.

Rule the Second.

The conſent of the maſter to the act of the ſervant in printing a libel, is *prima facie* evidence of publication by the maſter, and a general allegation of ignorance is not admiſſible evidence in his favour, though he may repel the preſumption by proof of particular facts.

As in the KING *v.* BENJAMIN HARRIS, 32 *Car.* 2. for publiſhing a libel. In this caſe the proof of publication was, that books were ſold in the defendant's ſhop, not by him, but by his man, and there was alſo proof of quires of the ſame book being in his ſhop. It was however admitted, that the defendant did ſell one book, but that ſoon as he heard there was any thing ill in it, he ſuppreſſed the ſale.

SCROGGS, C. J. held, the act of ſelling under the circumſtances ſtated, evidence of publication; and ſtated that all the judges had declared the offence of ſelling to be puniſhable in the ſeller, though in the way of his trade. 2 *St. Tr.* 1039. Vide *lord Camden's obſervations on this trial.* 11 *St. Tr.* 322. *Entic v. Carrington.*

So in the KING *v.* NUTT, *Hilary*, 2 *Geo.* 2. the defendant was indicted for publiſhing a treaſonable libel. It appeared in evidence, that ſhe kept the ſhop where the libel was ſold, but no evidence was offered to prove her knowing of its being bought in, or ſold out; and ſhe proved, that her reſidence was a mile from her ſhop, and that ſhe had been bedridden there for a long time, ſo that the preſumption was, that ſhe knew nothing of the libel, or the publication.

Kettleby ſubmitted, that on this evidence ſhe ſhould be acquitted; for though the act of the ſervant may charge a miſtreſs in a civil ſuit, it ſhould not charge her in a criminal proſecution.

The CHIEF JUSTICE ſaid, it has been expreſsly determined, that the maſter of a ſhop is anſwerable for whatever books are ſold there. A juror however was withdrawn. *Barnard. K. B.* 386. *Fitzg.* 47.

In the KING *v.* ALMON, *Trinity*, 1 *Geo.* 3. *B. R.* the rule is fully eſtabliſhed. This was an application for a new

new trial; upon the ground of the evidence being insufficient to prove any *criminal intention* in the defendant, or even the leaſt *knowledge* of the libel having been ſold at his ſhop. The defendant's affidavit ſtated, that it was a practice in the trade to put another publiſher's name to a pamphlet, as printed for that other, when in fact, it was publiſhed for himſelf. This was the fact in the preſent caſe, *Miller* being the real publiſher of this libel, though advertiſed, &c. in defendant's name, without conſent or conſultation; that the ſale in his ſhop was without his privity, and that he ſtopped it as ſoon as he diſcovered it. The perſon who ſold was defendant's ſervant.

Glynn, ſerjeant, argued, that the proof againſt the defendant appeared defective; there was nothing to conſtitute criminality, or to induce puniſhment.

Lord MANSFIELD delivered the unanimous opinion of the court to be, that the buying the pamphlet, in the public ſhop of a known profeſſed bookſeller, and publiſher of pamphlets, of a perſon acting in the ſhop, *prima facie*, is evidence of a publication by the maſter himſelf, but that it is liable to be contradicted where the fact will bear it by *contrary evidence*, tending to exculpate the maſter, and to ſhew that he was not privy, nor aſſenting to it, nor encouraging it.

That this being *prima facie* evidence of a publication, by the *maſter* himſelf, it ſtands good until anſwered by him: and if it is not anſwered at all, it thereby becomes *concluſive*, ſo far as to be ſufficient to convict him.

That proof of a public expoſing to ſale and ſelling in his ſhop by his ſervant, is *prima facie* ſufficient: and muſt ſtand until contradicted or explained, or exculpated by ſome other evidence, and if not contradicted, explained, or exculpated, is, in point of evidence, ſufficient or tantamount to concluſion.

Reading the libel charged, ſhews that it is already *proved* upon the defendant; for it could not have been read againſt him, before it had been proved upon him.

ASTON,

Aston, Willes, and Ashurst, J's. concurred: and the cases of *Harris*, *ante* 644. *Strahan*, *Hil.* 2 *Geo.* 2, *post* 644. *And Elizabeth Nutt's case*, *ante rule* 3, were cited.

Rule the Third.

The delivery of a libel by the printer, is evidence of publication by the printer, and the receiver is an actor in that publication, if he does not forthwith carry it to a magistrate. *The King v. Strahan. Hilary*, 3 *Geo.* 1.

Rule the Fourth.

And evidence of a libellous paper being found in a man's custody, as upon a shelf in his house or shop, shall make him the printer of it, of consequence it is *prima facie* evidence of his being the publisher, and he must give a good account how he came by it to excuse himself. *Ibid.* 12 *Viner Abr.* 229. 4 *Read. stat. law.* 155. *Dig. law. lib.* 22.

Rule the Fifth.

But the bare printing a petition to a committee of parliament, which would be evidence of printing a libel against the defendant, if made for any other purpose but a complaint to a court of justice, and delivery of the copies thereof to the members of the committee, shall not be considered as the publication of a libel, in as much as it is justified by the order of the course of proceedings in parliament, whereof the king's courts will take judicial notice. 3 *Bac. Abr.* 498.

Rule the Sixth.

Where the defendant acts merely as servant, working the press without knowledge of the contents of the libel, he is chargeable as printer.

As in the King *v.* Clarke, *Hilary*, 2 *Geo.* 2. before Raymond, C. J. The indictment was, "for printing "and

"and publiſhing an infamous libel called Miſs Journal;" but the evidence produced was, that he acted merely as a ſervant to the printer, and his buſineſs was only to clap down the preſs; and few or no circumſtances were offered of his knowing the import of the paper, or of being conſcious of doing any thing illegal. The defendant, under the direction of the court was found guilty.

So in the KING *v.* KRELL, *Hilary*, 2 *Geo.* 2. The evidence was that the defendant and another compoſed together the types for printing the work, each taking different columns.

Hawkins and *Kettleby*, for the defendant, objected, that whatever interpretation the whole of the papers might receive taken together, yet taken ſeparately according to the ſhares which theſe two perſons had in it, the part which the defendant compoſed could by no means receive ſuch a conſtruction. He was charged *quod libellum impreſſit et publicavit, et imprimi et publicari cauſavit*, whereas by the evidence it appeared that the compoſing was only neceſſary to the *preſſing off*, and conſequently as the defendant was *only* proved to have *compoſed*, he could not be found guilty of the preſſing off, *(or printing)* and therefore the information had not charged the defendant with the proper fact. They further obſerved, that no evidence was given of a publication; therefore there ought to be an acquittal: beſides the information charged two offences in diſtinct and ſeparate parts; one of printing this particular libel, *in hæc verba*, the other of printing a libel generally; therefore as to the laſt charge, as no evidence was given of two offences, the jury ought at leaſt to acquit the defendant of one.

The Attorney General (Sir Philip Yorke, afterwards lord HARDWICKE.) This libel (which was a pretended piece of Perſian hiſtory) is one thing *intire*. One part has a dependence on the other, therefore he that is guilty of the one is guilty of the whole. To the ſecond objection he would agree, that is, if this was a civil action brought againſt the defendant for printing without authority to the damage of a particular perſon, the evidence given here would not make the defendant anſwerable; for he would have appeared to have acted merely as a ſervant,

and

and therefore as he had aſſiſted in one branch only of printing, and not of the whole, he could not be ſubject to ſuch action. But the preſent caſe was of a criminal nature. Where an acceſſary is criminal in part, he is criminal in the whole; and therefore as the defendant aſſiſted in the compoſing, which was a circumſtance eſſentially neceſſary to there being any printing, he by that act made himſelf anſwerable for the whole. Compoſing, he conſidered, taking a copy of a libel in types and figures, and taking a copy would make the defendant a publiſher; and this gave an anſwer to the third objection. As to the laſt objection, he obſerved, that laying informations in this way was begun in the time of *Holt*, and was done out of caution for fear of not ſucceeding in laying the fact particularly.

Raymond, C. J. agreed with the attorney-general in all but the act of publication; and directed the jury that if they believed the evidence they ought to find the defendant *guilty* of *printing*, which they did. *Barnard. B. R.* 305.

Rule the Seventh.

Though a publication in *fact* be proved, yet exculpatory evidence of facts exculpating the defendant may be admitted. Vide *The King v. Almon*, *Ante* 644.

Therefore it has been held that the defendant ſtands exculpated on evidence that he refuſed to receive the manuſcript libel to print, or the printed libel to ſell; and that it was clandeſtinely ſold in his ſhop againſt his poſitive orders.

That by reaſon of ſickneſs, as in the delirium of a fever, he was diſqualified from inſpecting the preſs, or regulating the trade of his ſhop.

Abſence, under circumſtances not importing fraud or neglect, in which caſe a temporary manager for the printer or bookſeller's buſineſs ſtands during the interval in the ſame reſponſibility as the maſter would have ſtood.

Impriſonment is *prima facie* exculpatory evidence; but not concluſive; for if acceſs of ſervants to the priſon be proved

proved and liberty of tranſmitting copies, proof-ſheets, &c. be ſhewn, the exculpation ceaſes. *The King v. Woodfall.* 1 *Hawk. P. C. ca.* 73. 7 *edit.* 2 *vol.* 131.

And in the KING *v.* WILLIAMS, *Mich.* 14 *Geo.* 3. where evidence was given that a newſpaper containing a libel was publiſhed before the defendant roſe in the morning, and that the printer afterwards ſtopped the ſale of the paper, the court refuſed to receive exculpatory evidence, and conſidered it inſufficient evidence for *acquittal*, but intimated that after verdict it would be proper in mitigation of the ſentence.

In the KING *v.* SALMON. *Hil.* 1717, *B. R.* The defendant, a linen-draper, allowed his ſon a *printer*, to uſe part of his ſhop for the ſale of pamphlets. In the abſence of the ſon, a pamphlet was called for, and the father ordered his niece to look it out and give it. The publication being libellous, the court granted an information againſt the ſon, but not againſt the father; conſidering his ignorance of the nature of the pamphlet ſufficient exculpation. 1 *Hawk. P. C. ca.* 7. *ſect.* 10. 7 *edit.* 2 *vol.* 131.

Rule the Eighth.

The *truth* of a public libel is not admiſſible evidence. Neither is the bad reputation of the perſon libelled. *Hawk. P. C. ca.* 73. *ſect.* 6. 5 *Co.* 125. 1 *Stra.* 498. 9 *St. Tr.* 253. *The King v. Franklin.* 3 *Bac. Abr.* 495.

Rule the Ninth.

But in the caſe of *ſcandalum magnatum*, when the word *falſe* is inſerted, the defendant ought not to be found guilty, if the aſſertion be *true*. *Emlyn. Pref. St. Tr.* 8.

So in the QUEEN *v.* FULLER, *Guildhall, London, May*, 1702. HOLT, C. J. would have permitted the defendant to prove the truth of his allegations, "againſt no-"blemen, peers, officers, and miniſters of ſtate," had he been able. 5 *St. Tr.* 441.

The above caſe has been erroneouſly conſidered as an authority that the *falſehood* of a public libel, as to fact, is eſſential to conſtitute the criminality, and the *truth* of it may be proved in juſtification: but the information

againſt *Fuller* ſeems to have been for *ſcandalum magnatum* on the ſtatute for ſpreading *falſe* news to the ſlander of great men; and in that inſtance as *falſehood* is a neceſſary averment in the information or indictments, ſo it muſt be proved in evidence. *Hob.* 253. *Moor* 627.

Rule the Tenth.

On indictments or informations for ſeditious libels, the word *falſe* in the only ſenſe in which it ſeems neceſſarily applicable is included in the word *malicious*; and it appears from various precedents that the word *falſe* is often omitted in ſuch indictments and informations, which ſhews it is not an indiſpenſable averment nor neceſſary to be proved.

Rule the Eleventh.

Publication on which a defendant may be convicted muſt always include *malice* either *expreſs* or *implied:* where therefore the facts in evidence exclude ſuch implication, a defendant is not legally liable to be convicted. *Gilb. Law. Evid. by Loft.* 845, 846.

The caſe of an individual illuſtrates this rule. In the KING *v.* HART. *Mich.* 3 *Geo.* 3. *Mary Jones*, a quaker, was expelled, as appeared on the quakers books, "for "not practiſing the duty of ſelf-denial." Having got a copy of the reſolution, ſhe applied for an information againſt thoſe who ſigned it for a libel; and this being refuſed, ſhe indicted them, and they were found guilty. The court granted a new trial, the whole tranſaction being merely *matter of diſcipline.* 1 *Blackſ. Rep.* 386. *See the King v. Paine.* 5 *Mod.* 167. *Ante* ,

Rule the Twelfth.

Variance in evidence between the original libel and that on the record is fatal. Vide *Variance in Index.*

In the KING *v.* HALL. *Hilary*, 7 *Geo.* 1. Information for a libel againſt the doctrine of the TRINITY. The witneſs for the crown who produced the libel ſwore that it was ſhewn to the defendant, who owned himſelf the author

author of the book ſhewn, errors of the preſs, and ſome ſmall variations excepted. Defendant's counſel ſubmitted that this evidence would not entitle the attorney general to read the book, becauſe the confeſſion was not abſolute, and therefore amounted to a denial that he was author of that identical book: but PRATT, C. J. allowed it to be read, ſaying, he would put it upon the defendant to ſhew that there were material variances. 1 *Strange*, 416.

Rule the Thirteenth.

Depoſitions taken before a juſtice of the peace relating to the fact of printing or publiſhing a libel, the deponent being ſince dead, cannot be received in evidence, though in felony they are admiſſible by *ſtat.* 1 *and* 2 *Phil. & Mary*. *Paine's caſe*, 5 *Mod.* 165. *Salk.* 281. *Comb.* 358, 359. *Ante* 283, 312.

Rule the Fourteenth.

In trial of indictment or information for a libel, on the plea of not guilty, the jury may give a general verdict, and ſhall not be directed to find guilty (as formerly) merely on *evidence* of publication and of the ſenſe aſcribed. But the judges may give opinion and direction to the jury on the matters in iſſue, as in other criminal caſes, and the jury may find ſpecially if they chuſe, and the defendant may move in arreſt of judgment as before. *Stat.* 32 *Geo.* 3. *ca.* 60. *Iriſh*, 33 *Geo.* 3. *ca.* 43. 17 *Stat. at large.*

Rule the Fifteenth.

A libel muſt be proved to be written in the county laid in the indictment; all matters of crime being local. 4 *Read. Stat. Law* 155. 8 *Mod.* 328.

CHAPTER XXXIII.

Of Evidence to ſupport a Charge of Bribery.

Rule the Firſt.

THE crime is complete by the *attempt*; and *evidence* of a bribe *tendered*, though rejected, is therefore ſufficient to convict the defendant.

As in the KING *v.* VAUGHAN. *Mich.* 10 *Geo.* 3. *B. R.* Motion on an information againſt the defendant for offering to bribe the Duke of *Grafton*, then firſt lord of the treaſury, to grant the reverſion of a patent place in the iſland of *Jamaica*, for five thouſand pounds.

Lord MANSFIELD. The queſtion turns upon the common law: and the firſt conſideration is, whether a great officer at the head of the treaſury, and in the king's confidence, ſelling his intereſt with the king, in procuring an office, be not guilty of a crime. The king is not to raiſe a revenue out of this office. The duke ſwears, and it is not denied, that five thouſand pounds were offered to him to procure this office for Mr. *Vaughan*.

Can it be doubted whether doing this would have been criminal in the duke of *Grafton*. Moſt of the impeachments againſt miniſters have been for taking money to procure offices grantable by the crown.

Wherever it is a crime to *take*, it is a crime to *give*; they are reciprocal. And many caſes, eſpecially in bribery at elections to parliament, the *attempt* is a crime. It is complete on his ſide who *offers* it.

If a party *attemps* to bribe a judge, meaning to corrupt him in a caſe depending before him, and the judge taketh it not, yet this is an offence puniſhable by law in the party that offers it. 3 *Inſt.* 47.

So alſo is a *promiſe* of money to a corporator to vote for a mayor of a corporation, or to bribe a privy counſellor. *The King v. Plympton*, 2 *Lord Raym.* 1377.

Rule

Rule the Second.

Neither is it material if the party bribed vote contrary to the bribe; for this cannot be given in evidence to exculpate either.

Rule the Third.

A loan on ſuch an occaſion is bribery by *gift*.

As in SULSTON *v.* NORTON. *Mich.* 2 *Geo.* 3. *B. R.* Action on the ſtatute of bribery at the election of *Tamworth*. Five counts in the declaration. Jury found a general verdict for the plaintiff. He took it on the firſt count only, *viz.* for corrupting one *Moor*, by giving him five pounds ten ſhillings to vote for lord *Villers* and ſir *Robert Burdett*.

Caldecot moved for a new trial on a ſuggeſtion, *Firſt*, That the perſon bribed did not vote for the candidate in whoſe behalf the bribe was given, therefore was not corrupted. *Secondly*, That *Moor* gave a note for the money, which it was agreed ſhould be deſtroyed, in caſe he voted as deſired, and a counter note was given for that purpoſe: therefore it was a *loan*, and not a *gift*; and the verdict ſhould have been taken on the ſecond count for a corrupt loan, and not on the firſt for a corrupt gift.

Lord MANSFIELD, C. J. FOSTER and WILMOT, J's. The firſt objection has been already ſolemnly determined in BUSH *v.* RAWLINS, *Trinity*, 29 *Geo.* 2. *B. R.* Action for corrupting one *Harvey*, by giving him twenty-one pounds, to forbear giving his vote for Mr. *Morton*, at the *Abingdon* election preceding. It appeared at the trial, that *Harvey* did vote for Mr. *Morton*, notwithſtanding the bribe, and always intended to do ſo. Verdict for plaintiff, and motion for new trial. It was twice argued; and DENISON, J. delivered the opinion of the court, that this was within the ſtatute, and cited PHILIPS *v.* FOWLER, *Paſ.* 7 *Geo.* 2. *C. B.* And undoubtedly the offence of the corruptor is complete, notwithſtanding the voter afterwards repents.

repents. As if one bribes a juror, and he afterwards gives a right verdict that will not exculpate the offender.

As to the ſecond objection, the loan and note is all colour and device: it is clearly a gift, and the verdict is rightly taken. 1 *Blackſ. Rep.* 317, 318.

And in COMBE, *qui tam*, *v.* PITT, *Mich.* 5 *Geo.* 3. *B. R.* This was an action on the ſtatute after a conviction of the defendant, by information; and three objections were taken to the evidence.

Firſt, That the declaration ſtates that the party was bribed to vote for Mr. *Lockyer* and lord *Egmont*, and it came out in evidence that it was for Mr. *Lockyer* and his *friend*.

Secondly, That the declaration ſtates that lord *Egmont* and Mr. *Combe* were candidates at the time the bribe was given, and no evidence was given thereof.

Thirdly, That it alſo ſtates that the perſons bribed had a right to vote, but no evidence was given thereof, but that they actually voted.

Lord MANSFIELD. As to the *firſt* objection in penal actions, the rule is that the material fact muſt be charged, and a fact charged muſt be proved ſufficient to warrant all the conſequences of a verdict. The *material fact* here is being *bribed* to vote. It makes no difference whether the proof was that he was bribed to vote for both, or for *Lockyer* only.

The *ſecond* objection goes upon the vague idea of what conſtitutes a candidate previous to the day of election. The poll is then the only evidence. The Houſe of Commons, in the caſe of *Gore*, of *Fing*, candidate for *Bucks*, determined that nothing was evidence of being a candidate but the poll-books. Before the time of election, every one is a candidate for whom a poll is aſked. This very fact makes the perſon on whoſe behalf a bribe was given, a candidate.

As to the *third* objection.—The defendant ſhall not diſpute a man's right of voting, when he has aſked him for his vote. It is a ſufficient proof of right that he actually did vote. There is no ground for the objections. Rule diſcharged. 1 *Blackſ. Rep.* 523, 4, & 5. 3 *Burr.* 1423 *to* 1434, *alſo* 1586 *to* 1591. *S. C.*

Rule

Rule the Fourth.

The perſon taking the bribe is a competent witneſs to prove the bribery. So in SUTTON *v.* BISHOP, and SELBY *v.* CUMMING, it is determined that under *ſtat.* 2 *Geo.* 2. *ca.* 24. *Engl.* againſt bribery at elections for members to ſerve in parliament, the perſon taking the bribe is a competent witneſs to prove the bribery. 4 *Burr.* 2285, 2469.

CHAPTER XXXIV.

Of Points of Evidence ariſing upon Indictments of the ſeveral ſpecies of crimes which come under the head MALICIOUS MISCHIEF, *which is defined to be an injury done to the property of another not falling under ſome more ſpecific denomination, either from the wantonneſs of a bad diſpoſition, or from particular and deliberate revenge.* 4 *Blackſ. Comm.* 244.

Rule.

BY *ſtat.* 9 *Geo.* 1. *ca.* 22. "the cutting down and deſtroying trees planted in an avenue, or growing in "a garden, orchard, or plantation for ornament, ſhelter, or profit," is made felony, *without* clergy.

Doctor BURN in his *Juſtice of Peace* has obſerved that the being armed and diſguiſed in the manner ſpecified in the act does not ſeem to enter into the conſtitution of the offence deſcribed by the ſtatute as to this and ſome other criminal acts, but to offences precedently ſpecified by the act.

Conſequently it follows that the indictment need not *aver*, nor is any *evidence* required to *prove* that the perſons deſtroying trees ſo circumſtanced as deſcribed were armed or diſguiſed.

But

But in the KING v. BAYLIS and REYNOLDS, 9 *Geo.* 2. it was ruled that the defendants being in the high road armed and diſguiſed, is made a ſubſtantive felony by the act; though the fact of being ſo armed and diſguiſed need not be given in evidence on indictments for ſeveral other offences under the act which are independent of it. *Caſ. Temp. Lord Hardwicke*, 291.

CHAPTER XXXV.

Of Evidence in particular caſes reſpecting Coining not made Treaſon.

Rule.

PERSONS uttering falſe money, gold or ſilver, knowing it to be falſe, are ſubjected on the *third* offence to felony without benefit of clergy. *Stat.* 15 *Geo.* 2. *ca.* 28. *ſec.* 9. *Iriſh*, 23 & 24 *ca.* 50. *ſec.* 2. 12 *Stat. at large* 770.

With regard to *evidence*, by which a repetition of this offence is to be proved, it is provided by the ſame ſtatute, that if any perſon uttering or tendering any falſe or counterfeit money as aforeſaid, ſhall afterwards be guilty of the like offence in any county or city, the clerk of aſſize, or the clerk of the peace for the county or city where ſuch conviction was ſo had, ſhall at the requeſt of the proſecutor, or any other on his majeſty's behalf certify the ſame by a tranſcript in a few words containing the effect and tenor of ſuch conviction, and ſuch conviction being produced in court, ſhall be *ſufficient proof* of ſuch former conviction.

By a ſubſequent ſtatute, perſons counterfeiting copper money, halfpence or farthings or buying, ſelling, taking, paying, or putting off ſuch money under the value by which its denomination imports, are made felons. 11 *Geo.* 3. 40. *Iriſh.* Vide *laſt cited ſtat. ſec.* 6.

Conſequently on the ſecond offence, if the record of the former conviction be given in *evidence*, no lay perſon can have the benefit of clergy.

As in the caſe of WILLIAM MARSTON ROTHWELL, *Old-Bailey ſeſſ.* 1783. The defendant was tried a ſecond time and convicted, and the record of his former conviction being produced, it was held that he could not plead the benefit of clergy in bar of execution, he not being in holy orders, and having pleaded it on the former conviction. *Addingt. Penal Stat.* 122.

The KING *v.* JAMES SCOTT, and others, is fully reported. *Old-Bailey ſeſſ. October*, 1785.

Scott and three others were tried before NARES, J. on an indictment containing four counts founded on 11 *Geo.* 2. *c.* 30. *Firſt*, that *Iſaac Votear* and *Thomas Dean* "one piece of copper money of this realm called an "halfpenny, then and there unlawfully and feloniouſly "did make, coin, and counterfeit againſt the ſtatute." *Second*, That "*George Franklin*, of &c. and *James Loft*, "of &c. did unlawfully and feloniouſly counſel, aid, "abet, and procure *Iſaac Votear* and *Thomas Dean*, &c. "to do and commit the ſaid felony, &c." *Third*, That "*Iſaac Votear* and *Thomas Dean*, &c. at the *pariſh aforeſaid*, &c. one piece of falſe, feigned, and counterfeit "copper money to the likeneſs and ſimilitude of the "good, legal, and current copper money called a half-"penny, then and there unlawfully and feloniouſly did "make and coin, &c." *Fourth*, This count charged *Franklin* and *Scott* as aiders and abettors to *Votear* and *Dean*.

The priſoners were all convicted; and on being brought up for judgment, they prayed the *benefit of clergy*, which was allowed, and each of them were ſentenced to pay a fine of one ſhilling, and to ſuffer one year's impriſonment in Newgate.

On the 13th of *October*, 1785, *James Scott*, one of the above four priſoners was convicted with two other perſons at the *Old-Bailey*, on the ſame ſtatute, for having counterfeited a farthing, and again prayed the benefit of the ſtatute.

The counſel for the crown filed a counter plea, ſetting forth the former indictment and conviction, averring that the priſoner was the ſame perſon who was named in the firſt indictment, and that ſince he had already re-

ceived the benefit of the ſtatute, and had been admitted to his clergy, prayed judgment of the court, "and that "the ſaid *James Scott* may receive judgment to die ac- "cording to law."

The priſoner replied, *Nul tiel record*, and denied that he was the perſon named in the ſaid plea; and the CROWN joined iſſue on this replication.

The ſheriff returned a jury *inſtanter*.

The *evidence* produced to ſubſtantiate the counter-plea was the record of the firſt conviction, which ſtated the ſeveral adjournments of the ſeſſion of the peace at which the indictment was found; the juſtices before whom it was found; the indictment itſelf *verbatim*; the proceſs on the ſaid indictment: with the trial and conviction of the ſeveral perſons mentioned therein; that they ſeverally prayed the benefit of the ſtatute, which was allowed them, and judgment given againſt them reſpectively to be fined one ſhilling and impriſoned one year in Newgate.

The counſel for the priſoner contended,

Firſt, That the counter-plea was inſufficient, inaſmuch as the indictment therein ſtated differed materially from the record of the indictment produced in evidence; and that the *tenor* of the indictment ought to have been correctly ſtated, the priſoner being intitled to take advantage of all *variances* between the plea and the record.

Secondly, That even if it were not neceſſary to ſet forth the whole of the indictment according to its *tenor*, yet that enough ſhould be ſtated to ſhew that the priſoner had been duly attainted of the former felony, which had not here been done, as no *place* was ſtated in the indictment or ſet forth in the counter-plea, where the offence was committed, from whence *the venue* could appear: nor did it appear that the principal felons were convicted, without which *James Scott*, who was only charged as an acceſſory, could not be convicted.

The jury on *vivâ voce* teſtimony being produced of the fact, found the identity of the priſoner; and the caſe was ſaved for the opinion of the JUDGES: whether the counter-plea was, in its preſent form, ſufficient to ouſt the priſoner of his clergy.

The

The JUDGES were of opinion, that the objections were not material upon the indictment, to which the counter-plea was pleaded. That the defects in the original indictment were *matters of error*, not to be taken advantage of on this counter-plea, and that there was no *material variance* between the copy of the indictment proved and that set forth in the counter-plea. *Leach, Cr. Ca.* 3 *ed.* 445.

CHAPTER XXXVI.

Of Facts neceſſary to be ſtated in an affidavit to put off a Trial.

Rule the Firſt.

THE poſtponing a trial is not a matter of right, either when the application is made on the part of the priſoner, or on the part of the crown; for in either caſe, the court in its diſcretion, even though an affidavit be made, may refuſe, or grant the motion. *Foſt.* 2.

Rule the Second.

The court in putting off a trial, on an allegation of the abſence of witneſſes, will take into conſideration evidence of the diſtance from which ſuch witneſſes are to be brought.

As in the caſe of the earls of KILMARNOCK and CROMARTIE, lord BALMERINO, and others, indicted for high-treaſon, by ſpecial commiſſion, at St. *Margaret's-hill*, in the borough of *Southwark*, *June*, 1745, before LEE, C. J.

The ſeveral priſoners produced an affidavit, to which they were ſworn in court, ſetting forth, that a material witneſs or witneſſes, naming the witneſſes and the places of their abode, would be wanted for their defence; and their counſel, who had been before aſſigned them, moved

that their trials might be put off for a reaſonable time for bringing up their witneſſes.

The *attorney-general* (ſir *Dudley Ryder*) prayed time to conſider of the motion; and thereupon the court adjourned to the next day.

The JUDGES, on conſultation, agreed that the caſe of theſe priſoners differs greatly from the common caſes of trials on the circuits, where affidavits of this kind ought to be *very ſparingly admitted.* For in circuit trials, the priſoners, from the time of their commitment, may, and ought to be preparing for their defence. The place where they are to be tried is in moſt caſes well known, and they have likewiſe a reaſonable certainty of the time, long before the circuits begin.

But in the preſent caſe, the priſoners are to be tried at a great diſtance from the places where the treaſons were committed; and, neither time nor place for their trials can be ſaid to have been certainly fixed, until bills of indictment were found againſt them, and copies delivered to them, from which time it was incumbent on them to be preparing for their defence, and getting their witneſſes to town.

And in regard that the *affidavits* mentioned the witneſſes to reſide at different diſtances from town, ſome in England, and others in Scotland, it was thought reaſonable, in fixing the times of trial, regard ſhould be had to the ſeveral diſtances.

Rule the Third.

But in collateral iſſues, where the *venire* is awarded and granted *inſtanter*, the court will not put off the trial of the iſſue, unleſs very ſpecial grounds be laid before the court.

As in the KING *v.* CHARLES RATCLIFFE, *Mich.* 22 *Geo.* 2. *B. R.* The priſoner being arraigned, he, *ore tenus* pleaded, that he is not the perſon mentioned in the record before the court. The attorney-general, *ore tenus* replied, the priſoner is the ſame *Charles Ratcliffe*, mentioned in the record, and this "I am ready to verify;" and iſſue was joined.

The

The priſoner's counſel preſſed ſtrongly to put off the trial of this iſſue, upon an affidavit of the priſoner, which was ſworn in court, that two material witneſſes, named in the affidavit, are abroad; one of them at *Bruſſels*, the other at St. *Germain*'s, and that he believeth they will attend the trial, if a reaſonable time be allowed for that purpoſe. But,

The COURT refuſed to put off the trial, and a *venire* was awarded *inſtanter*; for, ſaid the court, this proceeding is in the nature of an inqueſt of office, and has always been conſidered as an inſtantaneous proceeding, *unleſs proper grounds for poſtponing the trial be laid before the court*.. It was ſo conſidered in the *King* v. *Barkſtead*, and others, upon the ſame iſſue as this is. A *venire* was awarded, and jury returned and ſworn *inſtanter*, to try that iſſue. It was ſo conſidered in the *King* v. *Roger Johnſon*. *Kelyng* 13. 1 *Lev.* 61. 1 *Siderf.* 72. 2 *Hale P. C.* 40. 1 *Keb.* 244. 1 *Hawk. P. Cr.* 6 *ed.* 3. *in note*.

If Mr. *Ratcliffe* hath any thing to offer, which may give the court reaſonable grounds to believe, that his plea is any thing more than a pretence to delay execution we are ready to hear him; the ſingle iſſue is, whether he be or be not the perſon mentioned in this record, this is a fact well known to *him*, and if he is not the perſon, he might, if he had pleaſed, have made the matter part of his affidavit; he may do ſo ſtill, if he can do it with truth; and if he refuſeth to give the court this ſatisfaction touching the truth of his plea, the court doth him no manner of injuſtice in denying him the time he prayeth. *Foſt.* 41, 42, 46.

Rule the Fourth.

The court will not put off a trial on the mere evidence of a formal affidavit, unleſs there be circumſtances to ſhew that the party applying cannot have ſubſtantial juſtice without the delay he applies for. See Rule 1.

As in the KING *v.* LE CHAVELIER D'EON. *Trinity*, 4 *Geo.* 3. *B. R.* Information by the Attorney General for a libel on count de *Guerchy*. *D'Eon*, by counſel, moved to put off the trial, on account of the abſence of ſeveral

ſeveral material witneſſes, whom he ſpecified in his affidavit: and his affidavit contained the uſual aſſertions requiſite for putting off a trial, and particularly that "they were *material* witneſſes for him, that he could not "ſafely go to trial without their evidence; and that he "had hopes and expectations of procuring their pre-"ſence by the next *Michaelmas* term."

Upon ſhewing cauſe againſt putting off the trial, it appeared that the libel was not printed or publiſhed until *March* or *April*, and that theſe witneſſes went away from *England* to *France* in *November* or *December*. It appeared alſo, that they were natives of and reſidents in *France*; that they were in the ſervice of the crown, and that there was no probability of their being ſent over, or even permitted to come over to give evidence in behalf of *M. D'Eon*.

The COURT, after a full hearing, were unanimous that there appeared no ſufficient reaſon for putting off the trial. They granted that in all caſes, whether *criminal* or *civil*, and whether the nature of the proceeding be inſtantaneous or otherwiſe, a trial ſhall not be hurried on, as to do injuſtice to the defendant; an affidavit in *common* form may be ſufficient where no cauſe of *ſuſpicion* appears; but men take ſuch latitude to ſwear in *common* form, that where a ſuſpicion ariſes from the nature of the queſtion, or from contrary affidavits, the court will examine into the *ground* upon which the delay is aſked; and have in *criminal* as well as in *civil* caſes refuſed to put off a trial, notwithſtanding an affidavit in common form.

It is neceſſary therefore in ſuch caſes as this, *Firſt*, to ſatisfy the court that the perſons are *material* witneſſes. *Secondly*, to ſhew that the party applying has been guilty of no *laches* or neglect, in omitting to apply to them and endeavour to procure their attendance; and *Thirdly*, to ſatisfy the court that there is a *reaſonable* expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off.

But in the preſent caſe all theſe reaſons fail. Theſe witneſſes are ſworn to be material, as the defendant apprehends and believes: but on the contrary it appears negativly

negatively that they *cannot* be material: for as they were gone out of *England* ſome months before the printing or publication of this book, they could not be conuſant of the facts of the offence laid in this information. If their knowledge relates to any circumſtances that may ſerve to mitigate the puniſhment in caſe he ſhould be convicted, *that* ſort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavit.

But if it ſhould appear upon the caſe proved at the trial "that the defendant was prejudiced by refuſing "this delay," the court would ſet it right by granting a new trial; which had often been *ſaid* upon like occaſions, but *no* caſe had yet happened where any prejudice appeared to have been done, by the court's refuſing, upon particular circumſtances, to put off a trial notwithſtanding the *formal* affidavit.

As to their having been *ſent* out of the kingdom by the count *De Guerchy* himſelf, on purpoſe to prevent their giving teſtimony in the cauſe which has been alledged, there neither is any proof of it, nor is it poſſible that it could be ſo; they were actually gone *before* the fact, which is the ſubject of the charge, was committed. It is impoſſible that they could be ſent abroad by Mr. *De Guerchy* to prevent their giving evidence in *this* cauſe, the foundation of which did not exiſt at the time when they went. If they had been material witneſſes for the defendant in this cauſe, and *had* been ſent away by the perſon on whoſe account the proſecution has been carried on; *that* indeed would have been a ſufficient ground for putting off the trial until they could be had; but here is no pretence for ſuch an inſinuation.

Neither does it appear that there has been the leaſt endeavour uſed by this gentleman, or any on his behalf, to get them over.

And as to any expectation of their returning to *England* by the next *Michaelmas* term, or at *any* future time, there does not ſeem to be any probability of it; nor does the defendant lay before the court any *ground* of ſuch an expectation. On the contrary, the *reverſe* is highly probable: the preſumption ſeems ſtrong that they will not come.

come. They cannot be compelled to come, and it does not ſeem likely that they will be ordered to come for this purpoſe. Theſe are foreigners, natives, and reſidents in *France*, and in the actual ſervice of that king, which renders this caſe quite different from the ordinary caſes of *Engliſh* witneſſes being accidentally gone abroad, or gone for a ſmall time only, and expected to return to their own country, their natural home and reſidence.

Upon the whole they were clearly of opinion, that the putting off the trial could not tend to *advance* juſtice, but on the contrary to *delay* it, and therefore diſcharged the rule for ſhewing cauſe why it ſhould not be put off. 3 *Burr.* 1515. 1 *Blackſ. Rep.* 512. *S. C.*

Rule the Fifth.

The court will poſtpone a trial on the affidavit of a medical perſon, ſtating that the priſoner is in ſuch a ſtate of health as not to admit his being brought into court.

So ruled in *the King v. Patrick Finny. Commiſſion Oyer and Terminer, Dublin, July*, 1797. *Ridgeway's Rep. of the trial.* 1.

Rule the Sixth.

Or on ſatisfactory affidavit that a material witneſs is dangerouſly ill and unable to attend: or if it appear that a witneſs is abſent, though duly ſummoned, the court will put off a trial; but the truth of the allegation in the affidavit is to be judged of by the court.

So determined in the *King* v. *Finny*, above cited.

In this caſe the trial having been repeatedly poſtponed on affidavit, ſtating the illneſs of one material witneſs, and the abſence of others, CHAMBERLAINE J. and two other judges who ſat with him determined to refer the application to the other judges for their opinion, and adjourned the trial for two days.

CHAMBERLAINE J. SMITH B. preſent. In this caſe there has been an application on the part of the priſoner to put off his trial; there was ſomething indefinite as to the time. We underſtand, however, in ſubſtance, that

that it is a motion to poſtpone the trial until the next commiſſion, becauſe the approach of the term will not admit of a trial if it be put off further than Monday or Tueſday next. So that ſubſtantially the queſtion is, whether this motion ſhall be complied with by putting off the trial until next commiſſion.

Motions of this kind, particularly where the charge againſt the priſoner is high treaſon, muſt always be of the utmoſt importance; and in conſequence of that and ſome novelty in this caſe, it was the opinion of two judges with me that this matter ought to be referred to all the judges in town. Nine judges are unanimouſly of opinion that this motion, in the extent in which it is made, cannot be complied with.

Motions of this ſort are always addreſſed to the ſound diſcretion of the court, founded upon affidavits, but the affidavit is not to be held to contain ſufficient ground for putting off the trial merely becauſe it is in common form; the court muſt be ſatisfied, *firſt*, that due diligence has been uſed to bring the witneſs whoſe attendance is ſought for; *ſecondly*, that the abſent perſon would be really a material witneſs, or at leaſt that the priſoner or other perſon making the affidavit on his behalf does believe ſo; and *thirdly*, that there is a reaſonable expectation of his being produced at a future day.

He then entered into an examination of all the circumſtances attending the priſoner's application to the court. He is charged with high treaſon, together with ſixteen other perſons; the information ſhews he was charged with taking the moſt active part. They are all complicated in one charge. The defence in all probability is a common one. All but the priſoner have preſented petitions under the *habeas corpus* act to be tried; and upon being called up have inſiſted upon being tried—the priſoner alone is not ready. If they are regular in their petitions (on which I give no opinion at preſent) they muſt be tried at this commiſſion, or be diſcharged. If any ſhall be tried, the crown will be under the neceſſity of publiſhing the evidence againſt the priſoner, who is charged as the leader in the treaſon.

He then ſtated the ſeveral poſtponements, and minutely compared and examined the facts ſtated in the ſeveral affidavits, pointing out variances and inconſiſtencies, and ſaid that taking all theſe circumſtances together, it was for the conſideration of the JUDGES, whether they believed that the allegation of *James May*, being a material witneſs, was founded or not. And,

The JUDGES were unanimouſly of opinion, that although a trial ſhould not be preſſed forward where there is any danger to the priſoner from his not being prepared, yet that the *truth* of the allegations in the affidavit for putting off the trial muſt be judged of by them. It is in fact an iſſue directed to the judges whether the application be made for delay or not. And that there are many circumſtances to be collected in this caſe from *times and dates* of the affidavits, the time of ſerving the ſeveral ſummonſes, the conduct of the priſoner, and his attorney, and the particular ſituation of the caſe, as connected with other priſoners, which induce a belief that this application is not what it is profeſſed to be, but is intended either for unneceſſary delay, or as a ſtratagem made uſe of to compel the counſel for the crown to diſcloſe their evidence, or diſcharge the other priſoners under the *habeas corpus* act, if they have been regular in their proceedings. The JUDGES having with the utmoſt attention read all the affidavits, cannot ſay that this is a fair *bona fide* application, in order to provide neceſſary evidence for the priſoner.

With regard to the ſituation of *James May*, it is ſomething extraordinary: on the 13th of December Doctor *Harvey* viſited him, when he ſaid he had been confined ſeven weeks. The Doctor ſtates him to have been afflicted with a chronic head-ach, and that there is not much probability of his recovery, but that he may linger many years. If this motion were complied with from *May*'s ſituation, the priſoner would be intitled, during *May*'s life and inability to attend, *toties quoties* to put off his trial.

However, in ſtating this, I am deſired by the JUDGES to ſay, that if they were ſatisfied upon the other grounds that that application was neceſſary to the defence of the priſoner,

priſoner, and fairly made, they, notwithſtanding the ſituation of *May*, might poſtpone the trial, to ſee whether it might not pleaſe Providence to reſtore him at ſome future time.

But upon the whole, they are of opinion, that it is not fit or meet, for the adminiſtration of juſtice, that this application ſhould be complied with, in the extent which is ſought. However, the priſoner will have until Monday to prepare for his trial, which will be near eight months after his committal, and two months after the ſickneſs of the witneſs.

The priſoner was accordingly tried on Monday following, but the jury not giving credit to the principal witneſs, he was acquitted; and the ſixteen other priſoners implicated in the ſame indictment with him were, upon motion of their counſel, (*Mac Nally*) diſcharged from gaol, in purſuance of the *habeas corpus* act. *Ridgeway's Rep. of Finny's Trial*, 23.

Rule the Seventh.

The COURT will put off a trial on an affidavit, either on part of the crown or of the priſoner, ſtating, that printed pamphlets, &c. have been publiſhed and circulated, without the procurement or knowledge of the party applying, whereby the public mind has been prejudiced.

As in the KING *v.* the DEAN of St. ASAPH, *Spring aſſizes, Shrewſbury*, 1784. The trial was put off by the crown, on account of recent publications, whereby the minds of the jury might be prejudiced.

So in the KING *v.* ROBINSON, BROOKS, and others, *commiſſ. oyer and terminer, Dublin, July*, 1792. The priſoners were indicted for the wilful murder of —— *Lyneal*. A juror having been ſeized with a fit which endangered his life, the trial was prevented from proceeding from neceſſity, and DOWNES, J. diſcharged the jury. The next day the priſoners being put to the bar, their counſel, *Curran* and *Mac Nally*, moved to poſtpone the trial to the enſuing aſſizes, on this ground, that a partial and imperfect account of the evidence given in court on the former day, had gone abroad

through the medium of a newſpaper; and therefore from the impreſſion probably made thereby on the public mind, it was to be preſumed that the priſoners could not, at preſent, have the benefit of ſuch an unbiaſſed jury as the juſtice and humanity of the law requires.

The COURT ordered, that an affidavit of the fact ſhould be made, and that one of the newſpapers, containing the report of the evidence, ſhould be annexed thereto.

An affidavit was accordingly ſworn by *Robinſon*, one of the priſoners, in which he denied any knowledge of the publication.

Caldbeck, and *George* (now baron of the Exchequer) ſtrongly oppoſed putting off the trial, and the priſoners counſel were proceeding to anſwer them, but the COURT ſtopped them, being clearly of opinion that the affidavit ſtated ſufficient grounds to put off the trial. *MS.*

FINIS.

INDEX.

A

ABETTING and encouraging makes a principal, 527.
——— defined, 534.
Abettors, 526.
Acceptor of bill of exchange incompetent, 121, 123.
Acceſſory may defend principal, 462, 464.
——— where evidence ſhews the defendant to be acceſſory, and not principal, if indicted as principal he muſt be diſcharged, 496.
——— how variance affects the acceſſory, 513.
——— on his trial he may ſhew the principal's innocence, 466.
——— evidence againſt, 526.
Accomplice competent, 183, 194.
——— before indictment, 195.
——— after indictment, 199.
——— his ſingle teſtimony ſufficient to convict, 195.
——— admitting him a witneſs diſcretionary, 203.
——— competent in miſdemeanor, 204.
——— evidence againſt, 526.
Acts of parliament when miſrecited, 516, 517.
Admiralty court, 433.
Affidavit of wife may be read to bind the huſband, 175.
——— of a perſon infamous may be read to defend him from a charge, 212.
——— but not in making a charge, *ibid.*
——— to poſtpone trial, 659.
Agent, competency of. See Attorney.
Aiding, evidence of, 529.
Alibi, a dangerous defence, 467.
Aliens competent, 156.
Anſwer in chancery, the original only is evidence in criminal caſes, 468.
Approver, 183, 184. See accomplice.
——— competent, 183, 184, 185.
——— his confeſſion, 190.

Approver, his ſingle teſtimony ſufficient to convict, 195.
——— competent after indictment, 190, 199.
——— admitting him diſcretionary, 203.
——— in miſdemeanors, 234.
Approvements, 188.
Arreſts, 517. See Conſtable, Warrant, Murder.
Arſon, 605, 685.
——— there muſt be evidence of burning, 605.
Articles in writing, 123.
Aſportation. See Larciny.
Aſſault and Battery, 608.
——— in church-yard, 608, 609.
——— with intent to rob, 609.
Atheiſts incompetent, 95.
Attainder, how it affects competency, 206.
Attorney not to reveal his client's ſecrets, 239.
——— on what points he may be examined againſt his client, 240.
——— when examined by his client, may be croſs-examined to the points, 246.

B

Bacon (lord) his character, 7.
Bail not competent in miſdemeanors, 59.
Bank caſhier of competent, 121.
Bankrupt incompetent until certified, 114.
Baron and Feme, when witneſſes for or againſt each other, 160.
Barreter incompetent after judgment, 209.
Barriſter, when incompetent, 239.
Baſtard concealing, death of, 580.
Battery. See Aſſault.
Belief not evidence, 262.
Benefit of clergy, its effect, 213.
Bequeſt deſtroys competency, 117.
Bill of exchange, party to, incompetent, 120, 123, 143.
Bill of exceptions cannot be taken on pleas of the crown, 325.
Bond, obliger of, incompetent, 142. See Releaſe.
Bondſman incompetent, 156.
Books, when evidence, 359, 475.

Books of the Navy-Office, 475, 476, 477.
—— of a gaol, 477.
—— of a king's ſhip, 475.
—— of a bank, 475.
—— of a priſon, 477.
—— of herald office, 479.
—— of corporation, 478, 479.
—— copies of, 358.
Breaking. See Burglary.
Bribery, 652.
Broker, 128. See Inſurance.
Burglary, 600.
Burnet (biſhop), his objection to the ſtat. 7 Will 3. 33.
Burning in the hand reſtores competency, 213, 317.
——— diſpenſed with by ſtatute, 229.
——— houſes, 605. See Arſon.

C.

Carnal knowledge. See Infant, Rape, Buggery.
Carrying away. See Larciny.
Caſhier of a bank competent, 121.
Chance Medley, 553. See Murder.
Chancery, anſwer in, original only evidence, 468.
Character, evidence of, 320.
——— always admitted *in favorem vitæ*, 320.
——— extended in Ireland to miſdemeanors, 320.
——— a witneſs may aſſign his reaſons, 320.
——— if defendant's character be put in iſſue by the proſecution, particular facts are evidence, 324.
——— proſecutor cannot examine to defendant's character, unleſs defendant enable him, 324.
——— then proſecutor cannot examine to particular facts, 324.
——— of a witneſs can only be impeached by general accounts, 324.
——— party cannot diſcredit his own witneſs, 325.
Cheats, the party ſuffering incompetent, 144.
——— evidence to ſupport indictment, 637. See Fraud.
Children, when competent, 149.

Children muſt be ſworn, 150.
——— competent againſt parents, 181.
Church and church-yard, aſſaulting in, 608.
Clerk of grand jury cannot be examined, 253.
Clergy, benefit of, 213.
Coke (lord) his brutal conduct, 40.
Compariſon of hands, 394.
Competency diſtinguiſhed from credit, 15, 16, 107, 111.
——— courts lean againſt objections to competency, *ibid.*
——— reſtored by pardon, 136.
——— and by clergy and burning in the hand, 213. See Witneſs.
Coining, one witneſs ſufficient in, 32.
——— evidence of, 543.
——— when not treaſon, 656.
——— repeating the offence, *ibid.*
Compulſory proceſs for witneſs, 335.
Concealment in treaſon is miſpriſion, 30, 253.
Concealing birth of baſtard Child, 580.
Confeſſion at common law, 37, 39, 40, 51.
——— before a magiſtrate by ſtatute, 37, 38, 40, 50.
——— before a privy counſellor, 39.
——— in high treaſon, 268.
——— facts diſcovered by, 47
——— by torture, 275.
——— from hope, 45, 47.
——— from fear, 47.
——— from expectation of reward. See Reward.
——— of one perſon cannot be read againſt another, 40.
——— before a magiſtrate does not deſtroy competency, 40.
Confidential ſecreſy not binding on witneſs, 247.
Conſpiracy, judgment in, deſtroys competency, 209.
——— evidence of, in treaſon, 610.
——— in other caſes, 610, 633.
Conſequential intereſt, 105.
Conſtable, ſufficient to prove he acted as ſuch, 488.
——— his appointment need not be produced, 488. See Murder.

Conſtable under protection of the law, 569.
Converſation of priſoner, evidence, 361.
Convict, his declaration not evidence, 387.
Convicted perſons, the competency of, 206.
Conviction of principal evidence againſt acceſſary, 464.
Copies, where evidence, and where not, 355, 356, 358, 359.
Coroner, depoſitions before, 284. See examination.
Corporal oath defined, 8.
Corporator competent, 120.
Corporation papers not evidence, 359.
Courts, their judgment evidence, 427.
—— court rolls, 356.
Counſel. See Attorney.
County, where evidence may be given out of the county, 503.
——— inhabitant of, when incompetent, 60, 61.
Credit diſtinguiſhed from competency, 15, 16, 107, 111.
Crimen falſi, 206. See Infamy.
———— deſtroys competency, 209.
Crown ſummons, 335.
Cuſtom-houſe officer, proof that he is reputed ſufficient, 487.

D

Day, certainty of, need not be proved, 496.
Deaf and dumb witneſs competent by ſigns, 156.
Declarations of dying perſons, 174.
———— of a priſoner in converſation evidence againſt, but not for him, 361.
———— exception to the rule, 361.
———— of a convict not evidence, 387.
———— in conſpiracy, &c. 611.
Decypherers may give evidence of a paper, 420.
Deeds, parties to, incompetent, 123.
Depoſitions before juſtices, 49, 284.
———— before the coroner, *ibid.*
———— before the privy council, 39.
Diſcretion, what conſtitutes, 149, 150.
Doubts ſhould acquit, 3.
Diſſenters competent, 96, 97.

Drawer of a note incompetent, 120.
Dumb, 156. See deaf and dumb.
Dureſs does not deſtroy competency, 145.
Dying declaration, 174, 381, 387.

E

Eccleſiaſtical court, 427. See Judgment, Sentence, Court.
Emiſſion. See Rape.
Enter. See Rape, Buggary.
Evidence defined, 1, 2.
——— doubtful, 2, 3.
——— muſt be opened, 14, 282.
——— muſt be in priſoner's preſence, 14.
——— *ex parte* cannot be read on trial, 15.
——— hearſay not admiſſible, 25, 360.
——— at common law ſtill admiſſible in treaſon, 34, 505.
——— the beſt muſt be produced, 342.
——— collateral admiſſible, 34.
——— no diſtinction between evidence on civil and criminal caſes, 380.
——— parol, 341.
——— written, 393.
——— on oath always for the king, 9.
——— when allowed for the priſoner, 12.
——— in treaſon, 28, 29, 505.
——— by medical men, 329.
——— to ſupport an indictment, 493.
——— to ſupport general iſſues, 493.
——— muſt bring the offence within the ſtatute on which party is indicted, 494.
——— when given out of the county, laid, 503.
——— of treaſon at common law, 505.
——— againſt principal in the ſecond degree, 525.
——— the ſame when indictment is on a ſtat. as at common law, 525.
——— againſt aiders and abettors, 526, 542.
——— diſtinguiſhed from overt-acts, 543.
——— on coining, 543.

Evidence of juſtification, &c. lies on the priſoner, 546.
——— of malice, 546.
——— in murder, 553 *to* 570.
——— in manſlaughter, *ibid.*
——— in other homicides, *ibid.*
——— in petty treaſon, 574.
——— on ſtatute againſt ſtabbing, *ibid.*
——— preſumptive, 577.
——— of concealing birth of baſtard child, 580.
——— in larciny, 586.
——— of robbery, 594.
——— of ſtealing privately, 599.
——— in burglary, 600.
——— of breaking, 600.
——— of entering, 601.
——— in arſon, 605.
——— in rape, 606.
——— of marriage by force, 606.
——— of threatening letter, 607.
——— in aſſault and battery, 608.
——— in conſpiracy, 610.
——— in perjury. See Perjury.
——— forgery, 637.
——— againſt cheats, 637.
——— in libel, 642.
——— exculpatory, 642, 649.
——— in mitigation of ſentence, 649.
——— of bribery, 652.
——— in malicious miſchief, 655.
——— in coining copper money, 656.
——— on plea of clergy, 657.
Examinations before magiſtrate or coroner, 49, 284.
——— cannot be read in miſdemeanor, 651, 283.
——— may be read where party is dead or unable to travel, 285.
——— or detained by means of priſoner, 286, 292, 316.
——— may be read for priſoner as well as for the crown, 288.
——— may be compared with the evidence given on trial, 290.

Examinations may be taken in treaſon, and certified by magiſtrates, 292.
——— their ſubſtance muſt be proved to have been truly taken, 293.
——— inſtances where read, though *viva voce* evidence could be had, 294.
——— if not judicially taken cannot be read, 296.
——— may be tranſmitted as evidence from one county to another, 314.
——— if ſworn before another juriſdiction, not evidence, 314.
——— cannot be read in England on trial for high treaſon, 315.
——— may in Ireland, 315.
——— theſe rules diſpenſed with by the Commons in Fenwick's caſe, 316.
——— in Ireland may be read by ſtat. where party is put to death or kept out of the way, 319.
Exception, 325. See Bill of.
Exciſe-officer. See Cuſtom-houſe.
Excommunication, 427.
Exculpatory evidence in libel, 649.
Exemplification of Engliſh courts, 427.
——— prove themſelves, *ibid.*
——— of foreign courts, *ibid.*
Expences of witneſſes, 337.
Experts. See Medical Men, 329.
Extremis, evidence in, 174, 381.

F

Facts diſcovered by confeſſion evidence, 47.
Falſe is implied in malicious, 650.
Falſehood not eſſential to a libel, 649.
Fear, putting in, 597. See Robbery.
Felony deſtroys competency, 206.
Feme de jure not competent againſt her baron, 161, 171.
——— *de facto* competent, *ibid.*
Female infant, carnal knowledge of. See Children.
Fenwick, evidence on his impeachment, 29.
Foreign courts, their judgment evidence, 428.
Forcible marriage, 161, 171.

Forgery deſtroys competency, 120, 121, 141, 206.
——— unſtamped paper, evidence in, 481.
——— evidence to prove, 637.
——— variance fatal in. See Variance.
Fraud. See Cheat.

G

Gaol books evidence, 477.
Gaolers protected like other officers, 573.
Gazette evidence, 479.
General iſſue, evidence to ſupport, 493.
Gentoos competent, 64.
Grand jury clerk cannot be examined, 253.
—— larciny. See Larciny.
Great ſeal, only evidence of pardon, 130.

H

Hand-writing. See compariſon of hands.
——— proof of the ſame in criminal as in civil caſes, 417.
Hearſay not evidence, 360.
——— may be uſed as inducement or illuſtration of, *ibid.*
Heralds books evidence, 476.
Homicide, 552.
——— excuſable, 554.
——— juſtifiable, 559 *to* 580. See Murder.
Houſe of Lords, copies of their minutes and judgments 357.
Houſe burning, 685. See Arſon.
Hue and Cry, 576. See Murder.
Hundreders competent, 61.
Huſband and wife, when admitted witneſſes for or againſt each other, 161.

I

Idiots incompetent, 158.
Idolaters competent, 64, 95.
Impeachment of Fenwick, 29.
Implied malice, 550.
Indictment, evidence to ſupport, 493. See Evidence.
Indorſer of note or bill not competent, 120, 143.
Informations,

Infamous perſons incompetent, 206.
——— ——— how reſtored to credit, 213.
Infant. See Children, 149, 150.
Infidels competent, 95.
Influence goes only to credit, 111.
Informations, 282.
Informer competent, 60.
Inquiſitions, when evidence, 284.
Inſurance-broker, when competent, 128.
Intereſt, how it affects competency, 59, 60.
——— difference between intereſt and influence, 105.
——— immediate, affects competency, 60, 105, 117, 124, 128, 139, 143.
——— remote, its effects, *ibid.*
Intereſted witneſſes, 52, 139.
Ireland never obtained the ſtatute of treaſon, 7 Will. 3. 274.
Iſſue may be ſent to the jury on one priſoner when two are on trial, 56.
—— ſuch priſoner if acquitted is rendered competent, 56.
—— the evidence muſt be confined to the iſſue.
Judges competent witneſſes, 237.
Judgment muſt paſs to deſtroy competency, 211. Vide Record, Conviction, Attainder.
——— (final) of a court evidence, 428.
——— of foreign courts, *ibid.*
Jurors competent witneſſes, 328.
Jury, clerk of grand, muſt keep their ſecrets, 253.
—— not Judges of malice, 548.

K

King. See Sign manual.
—— his pardon. See Pardon.
Knowledge not evidence, 262.
——— ——— except from profeſſional men, *ibid.*

L

Larciny, 586.
——— from the perſon, 594.
——— petit, 230.

Legacy deſtroys competency, 117.
Letter, threatening, 607.
Levying war in any county, evidence of compaſſing, 504.
Libel, 642.
—— ſtatute regulating the trial of, 651.
—— exculpatory evidence in, 649.
—— muſt be proved in the county laid, 651.
Lords, how they are to give evidence, 158.
—— have no privilege as witneſſes, 248.
Lunatics, when competent, 158. See Idiots.

M

Mahometans competent, 95.
Magiſtrate, how he ſhould take confeſſions, 39. See Examination.
Malum in ſe. See Murder.
——— *prohibitum.* See Murder.
Malice, 546.
——— defined, 548.
——— expreſs, *ibid.*
——— implied, *ibid.*
——— the court, not the jury, judges of it, *ibid.*
——— in libels, 650.
Malicious implies falſe, 650.
——— miſchief, 655.
Manſlaughter, 553 *to* 583.
Marriage, evidence of, forcible, 161, 171.
Maſter incompetent witneſs for ſervant, 120.
——— anſwerable for his acts, 642. See Libel.
Medical men, evidence by, 329.
Memorandums may be uſed by a witneſs, 263.
——— exception to this, 265.
Minutes of the Lords, 357.
Miſchief malicious, 655.
Miſpriſon of treaſon, evidence of, 30.
——— concealment is miſpriſon, 253.
Miſrecital, where fatal, 516. See Variance.
Murder, 552.
——— words eſſential to the indictment, 553.
——— facts which conſtitute the crime and ſupport the indictment, 553 *to* 580. See Manſlaughter, &c.
Muſter book of a ſhip, evidence, 475.

Navy-

N

Navy-office-book evidence, 475.
Night, 600. See Burglary.
Note, indorſer of, or other parties to, not competent, 120, 123, 143.
Notice on priſoner to produce papers in his cuſtody, 350.
———, if not produced, ſecondary evidence may be given, *ibid.*

O

Oath defined, 8.
—— ſeveral kinds of, 9.
Obligor of a bond incompetent, 142.
Office copies, when evidence, 355.
Officers of juſtice. See Conſtable, Warrant, Cuſtom-houſe, Exciſe.
——— under protection of the law, 569.
Opinion when evidence, 262. See Belief.
Overt-act written papers, 421.
——— levying war, 504, 505.
——— no evidence can be given of an overt-act not in the indictments, 505.
——— manner of proving, 510.
——— diſtinguiſhed from evidence, 543.

P

Pagans competent witneſſes, 64, 95.
Papiſts competent witneſſes, 97.
Pardon by the king reſtores competency, 231.
——— it not only reſpites puniſhment, but abſolves from the crime and reſtores, 233.
——— but where diſability is, by ſtatute, and part of the judgment, pardon does not reſtore, 235.
——— by ſtatute, 237.
——— to reſtore competency, muſt be under the great ſeal, 230. See Sign manual.
——— promiſe of, though under ſign manuel, does not reſtore to competency, 148.
——— in manſlaughter, 226.
Parents competent againſt children, 181.
——— right to chaſtiſe, 556.

Pariſhioners, 128.
Pariſh regiſter evidence, 356.
Parol evidence, 341.
—— not admitted to contradict written, 344.
Party to a ſecurity competent, 123, 124.
Particeps criminis. See Accomplice and Approver.
Peers how examined, 158.
—— entitled to clergy without burning in the hand, 225.
—— have no privilege as witneſſes, 248.
Perjury, two witneſſes neceſſary in, 37.
——— the party injured incompetent under the ſtatute, 143.
——— not ſo at common law, *ibid.*
——— *poſtea* of the former iſſue evidence, 468.
——— original anſwer muſt be produced, 470.
——— and proved, 470.
——— evidence to ſupport indictment in, 635.
——— variance in. See Variance, Subornation.
Petit treaſon, 30, 36.
——————— evidence in, 574.
——— larceny, conviction of, deſtroys competency, 230.
Petit larceny diſability removed by ſtatute, 230.
Pillory, 206 See Infamy.
Place, how far material, 500.
Poiſoning. See Medical men.
Popiſh recuſant, how admiſſible, 99.
Poſtea of former iſſue, evidence in perjury, 468.
Preſumptive evidence, 577.
Principal in ſecond degree, 523. See Murder. See Acceſſary, 496.
Printing, 642. See Libel.
Priſoner, not formerly allowed witneſſes, 6.
——————— allowed witneſſes and proceſs, 10, 13.
——————— evidence muſt be in his preſence, 14.
——————— his confeſſion evidence, 40.
——————— his converſation evidence, 40, 41.
——————— ſhould not be ſworn before a magiſtrate. See examination.
——————— what he has ſworn on one trial not evidence againſt him on his own, 390.
——————— if he refuſes papers in his poſſeſſion, ſecondary evidence will be received, 348.

Privately ſtealing from the perſon, 599.
Privilegium clericale, 213.
Privy counſellor, confeſſion before, 39.
Probus et legalis homo, 219, 227, 229.
Proceſs allowed to witneſſes for priſoner, 10, 13.
Promiſes bar evidence by confeſſion, 42.
Proprietor of ſtock, when competent, 143.
Proſecutor incompetent from intereſt, 54.
Prieſt not exempt from giving evidence, 253.
Proteſtant aſſociation, 71, 97.
——— Diſſenters, 96, 97. See Diſſenters.
Public officer, when he muſt ſhew warrant, 485.
——— ——— ſufficient to ſhew he acted.
Publication, 642. See Libel.
Proceſs for witneſſes, 335.
Prochein amy incompetent, 60.
Profeſſional men may give evidence from knowledge or ſkill, 263.
Promiſe of pardon does not reſtore competency, 230.
Proprietor of ſtock incompetent, 143.
Proof, 1.
Proximity of blood, how it affects competency, 160.

Q

Quakers incompetent in criminal caſes, 100.
Quality of evidence, 342.

R

Rape, 606. See Infant.
Receipt, the ſigner, incompetent, 143
Record, evidence by, 427.
——— muſt be produced to prove infamy, 212, 230.
——— of conviction is concluſive evidence to bar competency, 463.
——— variance between record and evidence, 512.
Recuſants Popiſh, 99.
Regiſter of marriage.
Releaſe reſtores competency, 142. See Intereſt.
Religion, profeſſors of any, competent, 88.
Remiſſion, charter of, 223, 233. See Pardon.
Reputation. See Character.
Reſtoration, charter of, 223, 233. See Pardon.

Reſtitution of good, 53, 54.
Reward, 61.
Robbery from the perſon, 594, 595.
——— from the houſe. See Burglary.
——— aſſault with intent to commit, 609.
Roll of court-baron, 486.
Sacramentum, 8. See Oath.

S

Scotch covenanter competent, 97.
Seals of ſuperior courts prove themſelves. See Record, Judgment.
Securities for money, parties to, incompetent, 121, 122, 123.
Sentence of foreign courts, evidence, 427.
——— of a ſpiritual court not concluſive, 430.
Secretary of ſtate, confeſſion before, 39.
Self-defence. See Murder.
Serement, 8.
Serment, *ibid.*
Servant, when anſwerable. See Libel, 642.
Sign manual does not reſtore competency, 231.
Signs, evidence from perſons deaf and dumb, 156.
Similitude of writing, 394.
Solicitor not to reveal clients ſecrets, 240.
Special verdict muſt find facts, 256.
Spiritual court. See Sentence.
Stabbing act, 574.
Stamps, 480.
State trials, their character, 26.
Statutes, hearſay evidence by.
——— for examining on oath, 13.
——— indictment on, 494, 525.
——— of treaſons, 15, 21, 38.
——— of Philip and Mary, 38, 50.
——— of William 3. *Ibid.*
——— when miſrecited, 516, 517.
Stealing privately from the perſon, 599.
Still-born child, 581. See Symptoms.
Stock, proprietor of, 143.
Stuarts, trials in their reigns, 295.
Subornation of perjury, 636.

Symptoms of poiſon. See medical men.
——— of child being ſtill born, 581.

T

Taking, what amounts to, 588.
Temerary, 577. See Preſumption.
Teſtis, 1.
Threatening letter, 607.
Time, 496. See Day.
Torture, 275.
Treaſon (high) number of witneſſes required in, 36.
——— levying war in any county, evidence on an indictment for compaſſing, 504.
——— evidence of at common law is received on indictment for treaſon on the ſtatute, 505, 543.
Treaſon (petit) witneſſes required in, 30, 36.
——— evidence to ſupport an indictment in.
——— reſpecting the coin, 36.
Trials (ſtate) their character, 26.
—— for treaſon ſhall be by courſe of common law, 28.
—— oppreſſive, one cauſe of the revolution, 29, 30.
—— affidavit to poſtpone, 659.
Tudors, trials in their reigns, 285
Turks competent, 95.

V

Variance in teſtimony of a witneſs on different trials may be given in evidence, 291.
——— in the day laid immaterial, 499, 500.
——— as to the place, 500.
——— between the written evidence given and the record, 511.
——— where a public ſtatute is ſet forth, variance is fatal, 516.
——— between circumſtances ſet forth in the indictment and thoſe given in evidence, 520.
——— as to the inſtrument, *ibid.*
——— or other means laid, 521.
——— how it affects acceſſaries and abettors, 539.
——— between the ſpecial, circumſtances in indictment and the evidence not fatal, 552.

Variance, how it affects the acceſſory or abettor, 539.
Verdict (ſpecial) is not to find evidence, but facts, 526.
——— where evidence.
Verulam (lord), his character. See Bacon.
Villeins competent, 156.
Violent preſumption, 577.
Voluntary burning, 605.
Voir dire, 109, 113, 114, 116, 140, 145.
Uſury, party to the contract, incompetent, 60.

W

Warrant, when it muſt be ſhewn in evidence, 485, 489.
——— if irregular, does not juſtify homicide, 488.
——— perſons executing, protected, 571.
——— blank warrant, 489.
Witneſs defined, 1.
——— the oath of, 1.
——— can only give evidence to the point in iſſue, 2.
——— his credit ſhould be doubted, *ibid.*
——— neceſſary number in treaſon, by ſtatute, 15.
——— not allowed a priſoner, 6, 10, 13.
——— when allowed, *ibid.*
——— at common law, 30, 31, 32.
——— in Ireland, 31.
——— where no corruption of blood, 35.
——— always examined for the crown, 290.
——— may now be examined for the ſubject, 10, 13, 290, 296.
——— not bound to accuſe themſelves, 256.
——— but muſt anſwer to the fact of ſuffering for an infamous crime, 258.
——— not bound to ſhew their own turpitude or infamy, 123, 258.
——— but muſt anſwer whether he has been charged with an offence, *ibid.*
——— muſt not depoſe from his knowledge, thought, or belief, 262.
——— may refreſh his memory from written memorandums, 263.
——— his character can only be impeached by general accounts, 324.

Witneſs not to be diſcredited by the party calling him by general evidence, 325.
——— but other witneſſes may be called to prove particular facts, 325.
——— proceſs to compel attendance, 335.
——— if in execution, muſt be brought up by *habeas corpus*, 336.
——— now in Ireland by rule of court, 337.
——— may be allowed their expences, *ibid.*
——— refuſing to give evidence, a contempt, *ibid.*
——— what he has ſaid on a former occaſion is evidence to confirm or invalidate, 378.
——— evidence may be given of witneſs's conſiſtency, 379.
——— may explain his evidence, 388.

Who may be witneſſes:

Infants having ſenſe of religion, 149, 150.
Deaf and dumb, 156.
Convicted perſon not infamous, 206.
Petit larciny, 230.
——— perſon convicted of, *ibid.*
Infidels, not atheiſts, 96.
Quakers, in civil caſes, 100.
Particeps criminis, 183, 194.
Approvers, 183.

Who may not be witneſſes:

Atheiſts, 95.
Quakers, 100.
Idiots, 156.
Lunatics, 158.
Infants without ſenſe of religion, 149.
Convicts on infamous crimes, 206.
Huſband againſt wife, 161.
Wife againſt huſband, *ibid.*
Barriſter, 239.
Attorney, *ibid.*
Solicitor, *ibid.*
Agent, *ibid.*

Intereſted

Intereſted perſons, 59, 60.
Writ, muſt be produced in evidence, 489, 490.
Written evidence, 393.
——— Compariſon of writing, 394.
——— Papers found in cuſtody of priſoner, 403, 421.
Written, ſame proof of hand-writing in criminal as in civil caſes, 417.
——— paper publiſhed by priſoner, 421.
——— attempted to be tranſmitted, *ibid.*
——— may be explained by the party ſwearing, 474.
——— Writs, authorities, warrants, &c. 489, 490.
——— when they muſt be produced, 485. Vide Records, Deeds, &c.
——— ſecurities, parties to, incompetent, 123.
——— ſecurity may be impeached by party thereto, 123, 124.
Words, evidence of, muſt be certain, 518.
——— evidence of compaſſing the king's death, 543.
——— no provocation to juſtify homicide, 564.